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In The

Supreme Court of the United States

JOSE ALFREDO RIVERA,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Under 28 U.S.C. § 2244(d), enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a one-year statute of limitations applies to applications for a writ of habeas corpus for persons in custody pursuant to the judgment of a state court. Jose Alfredo Rivera filed a successive habeas petition in the United States District Court for the Southern District of Texas, arguing that under *Atkins v. Virginia*, 536 U.S. 304 (2002), Texas could not execute him because he was mentally retarded. Under 28 U.S.C. § 2244(d)(1)(C), Rivera's one-year limitation period began to run from the date on which the *Atkins* decision recognized that executions of mentally retarded offenders were "cruel and unusual punishments" prohibited by the Eighth Amendment. The district court found that Rivera was mentally retarded and permanently enjoined his execution over the Directors' objection that Rivera's habeas petition was untimely under the one-year AEDPA statute of limitations. Upon appeal, the Fifth Circuit affirmed the district court's mental retardation finding, determining that the merits blend inseparably into the question of equitable tolling. But the Fifth Circuit remanded the case to the district court to conduct an evidentiary hearing on the issue of equitable tolling after concluding that Rivera's habeas petition was untimely as a matter of law.

CAPITAL CASE

QUESTIONS PRESENTED – Continued

This case presents the following important questions, which divide some courts of appeals:

1. Is a timely-filed motion for authorization in the court of appeals that is accompanied by the proposed habeas petition sufficient to satisfy AEDPA's statute of limitations?

2. Does the fact that an offender is "actually innocent" of the death penalty under *Atkins* render the one-year statute of limitations in 28 U.S.C. § 2244(d)(1)(C) inapplicable so that it cannot be applied to bar habeas claims because doing so would result in a fundamental miscarriage of justice?

LIST OF PARTIES

This petition stems from a habeas corpus proceeding in which the petitioner, Jose Alfredo Rivera, was the respondent before the United States Court of Appeals for the Fifth Circuit. Rivera is a prisoner sentenced to death and is in the custody of Nathaniel Quarterman, the Director of the Texas Department of Criminal Justice, Institutional Division ("Director"). All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Jose Alfredo Rivera respectfully petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the Fifth Circuit that vacated the district court's order denying the state's motion to dismiss on the basis of AEDPA's statute of limitations and remanding the case to the district court with instructions to hold an evidentiary hearing, make specific findings, and rule on the issue of equitable tolling.[1]

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 505 F.3d 349 (5th Cir. 2007). The order denying the petition for panel rehearing is unreported (Appendix B).

The Judgment of Conviction and Sentence of the State District Court of Cameron County, Texas' order is unreported (Appendix C). The United States District Court's memorandum opinion and order finding Rivera mentally retarded, granting habeas relief, and permanently enjoining him from being executed is

[1] Rivera does not challenge the Fifth Circuit's affirmance of the district court's finding that Rivera is mentally retarded, nor the Fifth Circuit's decision that the Texas Court of Criminal Appeals' dismissal of Rivera's state habeas petition was an "unreasonable application" of clearly established federal law. *See* 28 U.S.C. § 2254(d); *see also* Appendix A.

unpublished. 2007 WL 870927 (S.D. Tex., March 31, 2006) (Appendix D).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its decision and entered judgment on October 18, 2007. Appendix A. Petitioner timely filed a Petition for Panel Rehearing on November 1, 2007. Fed. R. App. P. 40(a)(1). The court of appeals denied rehearing on March 21, 2008. A copy of the Order denying rehearing appears at Appendix D. Petitioner has timely filed this Petition for Writ of Certiorari within 90 days of the order denying rehearing. Sup. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

28 U.S.C. § 2244(b) of AEDPA provides in relevant part:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on

> collateral review by the Supreme Court, that was previously unavailable[.]
>
> * * *
>
> (2) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2244(d) provides in relevant part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from * * * (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]
>
> * * *
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Also at issue in this case is the application of 28 U.S.C. § 1631, which states:

§ 1631. Transfer to cure want of jurisdiction

> Whenever a civil action is filed in a court as defined in section 610 of this title, * * * and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action * * * to any other such court in which the action * * * could have been brought at the time it was filed * * * , and the action * * * shall proceed as if it had been filed in * * * the court to which it is transferred on the date upon which it was actually filed in * * * the court from which it is transferred.

Fed. R. App. P. 22(a) provides in relevant part:

> An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court.

STATEMENT OF THE CASE

This death penalty case concerns: (1) whether a petitioner has satisfied AEDPA's statute of limitations by timely filing a motion for authorization in the court of appeals accompanied by the successive habeas application on the last day of the limitations period (even if the habeas application is not subsequently refiled in the district court until two business days after the motion for authorization was granted);

and (2) whether an evidentiary hearing on the issue of equitable tolling is required when the petitioner has been confirmed by the court of appeals to be mentally retarded.

In May 1994, Rivera was convicted and sentenced to death for murdering a child. Appendix C. During his trial, no evidence was adduced regarding Rivera's mental competency. On direct appeal, the Texas Court of Criminal Appeals ("CCA") affirmed the judgment and sentence, and Rivera did not seek certiorari review. Appendix A at App. 2. Rivera then filed a state court habeas petition, which the CCA denied on December 16, 1998. *Id.* Rivera then filed a federal habeas petition, which the district court denied on October 3, 2001. *Id.* The Fifth Circuit denied Rivera's application for a certificate of appealability ("COA") on November 27, 2002. *Id.* Rivera's execution date was set for August 6, 2003. *Id.* Up until this stage of the proceedings, Rivera had not asserted a claim based on mental retardation.

On June 20, 2003 – exactly one year after this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002) – Rivera filed a subsequent application for writ of habeas corpus with the CCA in which he presented for the first time a mental retardation claim based on *Atkins*. Appendix A at App. 2. This was the last day to bring an *Atkins* claim under AEDPA's one-year statute of limitations period. 28 U.S.C. § 2244(d)(1)(C). The CCA dismissed Rivera's application on July 25, 2003 for failure to produce sufficient specific facts to support an *Atkins* claim. Appendix A at App. 2. Thereafter, Rivera submitted a suggestion for rehearing to

the CCA and presented an affidavit from Dr. Richard Garnett. *Id.* at App. 2, App. 13-15. On August 5, 2003, the CCA refused to reconsider its decision. *Id.* at App. 2. Rivera filed, and the state courts rejected, a final state habeas petition on Wednesday, August 6, 2003. *Id.* This Court denied certiorari review on August 6, 2003. *Rivera v. Texas*, 539 U.S. 978 (2003).

Rivera also sought relief in federal court on his *Atkins* claim. Appendix A at App. 3. On Tuesday, August 5, 2003, Rivera filed a motion for authorization to file a successive petition in the Fifth Circuit, as required by 28 U.S.C. § 2244(b)(3)(A). *Id.* With the motion for authorization, Rivera also submitted his proposed successive application for habeas corpus. The Fifth Circuit denied Rivera's first motion on August 6, 2003, concluding that Rivera failed to make a *prima facie* showing of mental retardation because Rivera had not first presented Dr. Garnett's affidavit to the state courts. *Id.*

On the same date – the date of Rivera's scheduled execution – Rivera returned to state court and filed an application for a second subsequent writ of habeas corpus, presenting Dr. Garnett's affidavit that the Fifth Circuit refused to consider. *Id.* The state courts rejected Rivera's petition the same day, and Rivera then returned to the Fifth Circuit, filing a second motion for authorization to file a successive petition with the court. *Id.* The Fifth Circuit issued a second opinion late in the evening on Wednesday, August 6, 2003, concluding that Rivera had made a *prima facie* showing of mental retardation, authorizing the successive petition on that issue only, and

granting Rivera's petition for authorization to file a successive petition and staying the execution. *Id.* Rivera refiled his successive writ petition with the district court on Monday, August 11, 2003. *Id.*

The case was assigned to United States District Judge Filemon B. Vela, the judge who presided over Rivera's first federal habeas petition. The Director moved to dismiss Rivera's writ arguing that it was untimely as a matter of law and that Rivera was not entitled to equitable tolling. Appendix A at App. 3. Before Rivera's counsel could respond to the motion to dismiss, Judge Vela summarily denied the motion during a status conference in September 2003, but indicated that he would be willing to reconsider his ruling. *Id.* at App. 4.

Following the status conference, the mental retardation issue was briefed and a two-day evidentiary hearing was held in January 2004. *Id.* Judge Vela died before rendering a decision, and the case was re-assigned to United States District Judge Andrew S. Hanen. *Id.* Judge Hanen held a second evidentiary hearing on January 14, 2005, during which the court had an opportunity to see, hear, and directly question the three experts who had previously testified on the mental retardation issue before Judge Vela. *Id.* at App. 4-5. Following that hearing and extensive briefing from the parties, the district court, relying on all the evidence presented to both it and Judge Vela, issued its Memorandum Opinion and Order of March 31, 2006, finding Rivera mentally

retarded, granting habeas relief, and permanently enjoining the Director from executing Rivera. *Id.*; Appendix B. The Director did not revisit the AEDPA statute of limitations issue despite the district court's "explicit invitation to the state to brief and raise again the timeliness issue." Appendix A at App. 7. Instead, the state switched litigation strategies and focused on the merits of Rivera's *Atkins* claim. *Id.*

The Director appealed to the Fifth Circuit. On October 18, 2007, the Fifth Circuit affirmed the district court's finding that Rivera is mentally retarded. Appendix A. However, the Fifth Circuit determined that Rivera's application filed with the district court on Monday, August 11, 2003, was untimely. *Id.* at App. 6. The court of appeals vacated the district court's order denying the state's motion to dismiss on the basis that Rivera's claims are time-barred under AEDPA and remanded to the district court with instruction to hold an evidentiary hearing, make specific findings, and rule on the "potentially dispositive" issue of equitable tolling. *Id.* at App. 9.

Rivera moved for rehearing, arguing that his petition for habeas relief met AEDPA's statute of limitations because he filed with the Fifth Circuit within the required time period for a motion for authorization to file a successive petition attaching his proposed habeas petition. Appendix D. Although the Fifth Circuit found Rivera's argument "compelling," the court of appeals held that it was bound by *Fierro v. Cockrell*, 294 F.3d 674 (5th Cir. 2002), absent an intervening decision from this Court, an en banc

decision from the Fifth Circuit, or a change in statutory law. *Id.* at App. 114-15. Acknowledging that Rivera attached his proposed habeas petition, which was not required of the petitioner in *Fierro* and which the petitioner there did not do on his own initiative, the court nevertheless held that "this alone did not alter the analysis that undergirds *Fierro*." *Id.* at App. 115.

REASONS FOR GRANTING THE PETITION

I. This Case Provides the Court with a Means to Resolve Confusion in the Circuits over Compliance with AEDPA's Statute of Limitations By Timely Filing a Motion for Authorization with an Attached Habeas Petition.

The Fifth Circuit's determination that Rivera's habeas petition was untimely despite the fact that his motion for authorization was timely filed in the court of appeals with the proposed habeas petition attached presents a substantial issue not resolved by this Court and one which differs from the understanding of the Second Circuit, the Sixth Circuit, and the Tenth Circuit. *See Liriano v. United States*, 95 F.3d 119, 122-23 (2d Cir. 1996); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997); *Easterwood v. Champion*, 213 F.3d 1321, 1323-24 (10th Cir. 2000). The Fifth Circuit remanded this case for an evidentiary hearing on the factual basis for equitable tolling, but remand is not required because Rivera's habeas application was timely filed with the Fifth Circuit.

A. The Fifth Circuit's Decision in *Fierro* Should Not Control the Timeliness Issue, But If It Does, then the Analysis Is Inconsistent with Decisions from Other Circuits.

The Fifth Circuit, citing its prior holding in *Fierro v. Cockrell*, 294 F.3d 674 (5th Cir. 2002) determined that the filing of a motion for authorization to file a successive petition with the attached proposed habeas petition does not satisfy the AEDPA statute of limitations. Appendix D at App. 114-15. Accordingly, the court of appeals determined that Rivera's habeas application filed in the district court was untimely. *Id.*; *see also* Appendix A at App. 6. However, even assuming *Fierro* was correctly decided, *Fierro* is not controlling. *Fierro* holds only that a bare motion for authorization not accompanied by a habeas application will not satisfy the AEDPA statute of limitations.

In *Fierro*, AEDPA's one-year statute of limitations expired on November 28, 1997. Fierro filed his motion for authorization in the court of appeals on October 20, 1997. Fierro argued that his motion for authorization effectively initiated the one-year statute of limitations notwithstanding that a habeas petition must be filed in the district court. Fierro asserted that his motion included all the elements of a habeas petition, including a jurisdictional statement, a statement of facts, a statement of his claims, and legal authority supporting those claims. However, Fierro was not required to attach a proposed habeas petition to his motion for authorization nor did he do so on his own initiative. The Fifth Circuit

rejected Fierro's argument that his motion for authorization was sufficient, holding that the language of AEDPA and analogous case law compel the conclusion that a motion for authorization to file a successive petition is not itself an "application for writ of habeas corpus." 294 F.3d at 680; *see id.* at n.9 (citing *In re Epps*, 127 F.3d 364, 365 (5th Cir. 1997) (acknowledging that the current law requires a petitioner seeking to file a successive petition to attach the proposed petition to the motion for authorization).

Fierro's holding that a preliminary motion for authorization cannot satisfy the statute of limitations under the AEDPA, even if correct, does not resolve the issue in this case where the motion for authorization was accompanied by the habeas petition. *Fierro* expressly stated that it only dealt with "whether a motion for authorization alone could satisfy the statute of limitations." *Id.* at 681 n.11.

The Fifth Circuit's *In re Lewis*, 484 F.3d 793 (5th Cir. 2007) decision addressed the time-bar issue under AEDPA and seemed to intimate that the timely filing of a motion for authorization accompanied by a habeas application would be sufficient to satisfy the AEDPA's one-year statute of limitations and would be distinguishable from the situation presented in *Fierro*. In *Lewis*, the petitioner filed his successive application for habeas corpus in Texas state court on the very last day of his AEDPA period. *Id.* at 796. On December 6, 2006, the CCA issued a final judgment denying Lewis' state application. *Id.* This left Lewis one business day, until December 7, 2006, to file his

application in federal court. *Id.* The Fifth Circuit concluded:

> Although Lewis mailed his motion for authorization to file a successive federal habeas petition on December 7, 2006, generally mailing is not the equivalent of filing, and *an application is not considered filed until it is placed in the possession of the clerk of court.* Thus, Lewis' application was not filed until December 8, 2006. As a result, Lewis' application is barred by AEDPA's statute of limitations and must be denied, unless he has demonstrated that he is entitled to equitable tolling of the limitations period.

Id. (emphasis added, footnote omitted). Thus, in *Lewis*, the Fifth Circuit intimated that the application would not have been time-barred if the authorization motion (which had to be accompanied by the proposed habeas application) had been filed with the court by the deadline.

Rivera filed his motion for authorization accompanied by his successive federal habeas petition on the last day of the deadline for the AEDPA statute of limitations period. Rivera's application accompanied by the successive habeas application should be considered timely and sufficient to satisfy the AEDPA's statute of limitations. However, the Fifth Circuit has held that the analysis that undergirds *Fierro* is not altered by timely submitting the proposed habeas petition with the motion for authorization and that *Lewis* did not analyze this issue. Appendix D at App. 115.

In contrast, the Second Circuit has suggested in *Liriano* that a petitioner could submit an "application" to the court of appeals "accompanied by" the motion for authorization that "would be considered in determining the applicant's compliance with the applicable one-year limitations period." *Liriano v. United States*, 95 F.3d at 122-23. Citing *Liriano*, the Sixth Circuit has held:

> In facing this problem, the Second Circuit held that "when a second or successive petition for habeas corpus relief or § 2255 motion is filed in a district court without the authorization by this Court that is mandated by § 2244(b)(3), the district court should transfer the petition or the motion to this Court in the interest of justice pursuant to § 1631, as was done in this case." *Liriano v. United States*, 95 F.3d 119, 123 (2d Cir. 1996) (per curiam).
>
> The Second Circuit's view is persuasive. Thus, we hold that when a prisoner has sought § 2244(b)(3) permission from the district court, or when a second or successive petition for habeas corpus relief or § 2255 motion is filed in the district court without § 2244(b)(3) authorization from this court, the district court shall transfer the document to this court pursuant to 28 U.S.C. § 1631. The § 2244(b)(3) motion to file the second or successive petition or § 2255 motion will be deemed filed, for purposes of the one-year limitation periods established by § 2244(d) and § 2255, on the date that the § 2244(b)(3) motion is given to prison authorities for

> mailing and the prisoner has satisfied the verification requirements of Fed. R. App. P. 25(a)(2)(C). *See Houston v. Lack*, 487 U.S. 266, 270, 108 S.Ct. 2379, 2382, 101 L.E.2d 245 (1988).

In re Sims, 111 F.3d at 47. The Sixth Circuit has therefore indicated that even if no actual application is filed in the United States District Court, a mere request for authorization will satisfy the statute of limitations. *See id.* The Tenth Circuit has assumed, without explanation, that the time a motion for authorization was pending before it tolled the statute of limitations. *See Easterwood v. Champion*, 213 F.3d at 1323-24 (limitations period was "tolled during the twenty-three days that [petitioner's] request to file a successive habeas petition was pending before this court."), *appeal after remand*, 2001 WL 1204379 (10th Cir. Oct. 10, 2001) (unpublished). Because Rivera's habeas petition was actually filed with the Fifth Circuit before the AEDPA limitations period expired, it should be considered timely.

B. Rivera's Successive Habeas Application Should Be Considered Timely Filed Because It Would Have Been Timely if Transferred in the "Interest of Justice."

An unauthorized habeas application filed within the AEDPA limitations period in the district court can be transferred to the court of appeals and considered timely. The Fifth Circuit's *In re Wilson* decision confirms that a habeas application filed without the

court of appeal's prior authorization in the district court within the one-year limitations period that is transferred by the district court to the court of appeals is considered to be timely filed. *See In re Wilson*, 442 F.3d 872, 874 (5th Cir. 2006).

On June 20, 2003, the very last day of Wilson's AEDPA limitations period, Wilson filed successive applications for habeas corpus in both federal district court and Texas state court. The federal court proceedings were dismissed, and the state application went forward until the CCA issued final judgment denying Wilson's state application on November 10, 2004. *Wilson*, 442 F.3d at 874. Wilson then had one business day to re-file his application in federal court. Because November 11 was a federal holiday, Wilson's filing deadline was November 12, 2004. *Id.* On November 12, Wilson attempted to re-file his successive application in the district court without this Court's prior authorization as required under AEDPA. *Id.* (citing 28 U.S.C. § 2244(b)(3)(A)). The district court dismissed Wilson's successive application as unauthorized. *Id.* The Fifth Circuit acknowledged that had the district court transferred the application to it, the application would have been timely:

> Had the district court transferred the application to this court, rather than dismissing it as unauthorized, the application would have been timely, as the date of filing for limitations purposes would have related back to the date of the initial filing in the district court on November 12. *See* 28 U.S.C. § 1631 (permitting district court to transfer unauthorized

> successive applications for habeas corpus to court of appeals if "in the interest of justice," and providing for relation back).

Id. at 874 n.3 (emphasis added).

28 U.S.C. § 1631 provides authority for a transfer from the district court to the court of appeals. At least two circuits require the transferring of the document from the district court to court of appeals when the successive petition for habeas corpus relief is filed in the district court without authorization. *See In re Sims*, 111 F.3d 45 (6th Cir. 1997); *Liriano*, 95 F.3d at 123. Under § 1631, the document would be treated as if filed in the transferee court on the date upon which it was actually filed in the transferor court.

"Court" as used in § 1631 includes the courts of appeals and the district courts of the United States. 28 U.S.C. § 610. Thus, not only is the district court authorized to transfer an unauthorized habeas application to the court of appeals, but the court of appeals is likewise authorized to transfer an application for writ of habeas corpus to the appropriate district court. § 1631; Fed. R. App. 22(a) ("An application for writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court."); *see, e.g., U.S. v. McBride*, 149 F.3d 1175 (5th Cir. 1998) (per curiam) (unpublished) (transferring case from court of appeals to district court in the interest of justice because otherwise defendant would be denied the opportunity to appeal his conviction and sentence).

Because Rivera's habeas application could and should have been transferred from the court of appeals to the district court in the "interests of justice," it should be considered timely. This Court should grant the relief requested and resolve the confusion in the courts below regarding whether the timely filing of a motion for authorization in the court of appeals accompanied by the proposed habeas petition satisfies AEDPA's statute of limitations.

II. The Fifth Circuit's Decision Conflicts with the Holdings of Other Circuits that Actual Innocence of the Death Penalty Overcomes AEDPA's Statute of Limitations.

Finding that the district court did not clearly err in determining that Rivera had significantly subaverage intellectual functioning, related adaptive functioning deficits, and onset before age 18, the Fifth Circuit affirmed the district court's finding that Rivera is mentally retarded. Despite the potentially dispositive AEDPA statute of limitations issue, the court properly reached the merits of the also "potentially determinative" mental retardation issue holding that the merits of that issue "blend inseparably" into the issue of equitable tolling. Appendix A at App. 9-10. The Fifth Circuit observed that "answering whether Rivera is retarded is logically antecedent – if not a core element itself – to determining whether equitable tolling is available." *Id.* The court of appeals held that mental retardation was merely one consideration relevant to the determination of whether the AEDPA statute of limitations was to give way. But

the court held that such an inquiry was highly fact-specific and that the factual record from the district court from the initial habeas proceeding was not sufficient to make such an inquiry: " . . . what occurred during the nearly six months between the end of the first federal habeas proceedings and the filing of Rivera's state petition raising his *Atkins* claim is unclear." *Id.* at App. 8-9.

In remanding to the district court for a factual determination on equitable tolling,[2] the Fifth Circuit implicitly rejected the argument that Rivera's mental retardation itself precludes application of the AEDPA statute of limitations to bar his claim under the habeas doctrine's "miscarriage of justice" exception. *See id.* at App. 7. Other circuits have held that where, as here, a habeas petitioner has a credible claim of actual innocence, the AEDPA statute of limitations must effectively give way in order to permit a hearing of the petition. *See, e.g.*, *Souter v. Jones*, 395 F.3d 577, 599 (6th Cir. 2005). This Court should resolve the dispute among the circuits because important Eighth Amendment rights are implicated, as well as issues of judicial efficiency.

Because, as shown below, the statute of limitations must categorically yield to one who is death

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[2] This Court has never determined whether 28 U.S.C. § 2244(d) allows for equitable tolling. *Lawrence v. Florida*, __ U.S. ___, 127 S.Ct. 1079 (2007). In *Lawrence*, this Court assumed, without deciding, that equitable tolling was available. *Id.* at 1085.

ineligible under the Eighth Amendment, there is no basis to remand for a fact-specific inquiry on the issue of equitable tolling. There has already been a fact-finding on the issue of Rivera's mental retardation, and the Fifth Circuit determined that the district court's mental retardation finding was not clearly erroneous. Assuming that Rivera's habeas application was untimely, Rivera is nonetheless entitled to habeas relief under the miscarriage of justice exception.

To reach the merits of a procedurally defaulted claim in federal court a habeas petitioner generally must show "cause and prejudice." *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977); *Murray v. Carrier*, 477 U.S. 478, 492 (1986). However when failure to hear a claim would result in a "miscarriage of justice" this Court has recognized the power of federal courts to hear procedurally defaulted claims even without a showing of cause and prejudice. *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992); *Schlup v. Delo*, 513 U.S. 298, 315 (1995). The miscarriage of justice exception requires that the petitioner "establish that under the probative evidence he has a colorable claim of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 435, 454 (1986).

In *Sawyer,* this Court held that the miscarriage of justice exception also applies to claims of death ineligibility or actual innocence of the death penalty. *Sawyer*, 505 U.S. at 340. A petitioner who has a colorable claim of being actually innocent of the death penalty is entitled, just as one who is factually innocent, to lift a procedural bar because failure to hear such claims would result in a fundamental

miscarriage of justice. *See id.* Accordingly, a claim of actual innocence provides a "gateway" through which otherwise procedurally barred constitutional claims may be considered. *Schlup*, 513 U.S. at 315. An "actual innocence" exception to the bar on successive habeas petitions was codified through AEDPA at 28 U.S.C. § 2244(b)(2)(B)(ii), but Congress did not include the same or any similar exception in the provisions governing time limitations at § 2244(d). In *Dretke v. Haley*, 541 U.S. 386 (2004), this Court confirmed that the fundamental miscarriage of justice exception survived the AEDPA and that it remains available to capital offenders with colorable claims of actual innocence, whether of the sentence or of the crime charged. *Id.* at 393-94.

"Innocence of the death penalty" focuses on the objective elements that render a defendant eligible for the death penalty. *Id.* at 347. *Sawyer* held that to show "actual innocence" one must show by "clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer*, 505 U.S. at 336. When this standard is satisfied, a petitioner may access review of his otherwise time-barred claims via the "actual innocence" gateway. *Schlup*, 513 U.S. at 324, 237-38.

The Eighth Amendment's ban on imposing capital punishment on certain classes of persons provides definition to the concept of "innocence of the death penalty," and the Constitution categorically exempts

from execution the mentally retarded. *See Atkins v. Virginia*, 536 U.S. at 319-22. As this Court recognized in *Atkins*, the social purposes served by the death penalty – retribution and deterrence of capital crimes by prospective offenders – do not apply to mentally retarded offenders. *Id.* at 319. Because of their disabilities in the areas of reasoning, judgment, and control of their impulses, mentally retarded offenders do not act with the level of moral culpability that characterizes that narrow category of the most serious crimes for which the death penalty may be imposed. *Id.*

In addition, mentally retarded offenders have cognitive and behavioral impairments, including diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses. Their impairments make it less likely that they can process the information of the possibility of execution as a penalty, and as a result deter their future conduct based upon that information. *Id.* at 320. Thus, in *Atkins*, this Court concluded that the goals of retribution and deterrence were not furthered by executing mentally retarded offenders. *Id.* at 319-20.

Moreover, because of their reduced capacity, mentally retarded offenders face a special risk of wrongful execution. *Id.* at 321. They are less able to give meaningful assistance to their counsel, are typically poor witnesses, their demeanor may create an unwarranted impression of lack of remorse for

their crimes, and they are more likely to unwittingly confess to a crime that they did not commit. *Id.*

This Court has explicitly tied the miscarriage of justice exception to the petitioner's innocence because it preserves the balance between "the societal interests in finality, comity, and conservation of judicial resources with individual justice in the extraordinary case." *Schlup*, 513 U.S. at 324. Claims of categorical ineligibility for the death penalty, like mental retardation, are uniquely unsuitable for application of a rule intended to promote finality because society has no legitimate interest in sentencing these defendants to death in the first place. *See Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) ("There is little societal interest in permitting the criminal process to rest at a point where it ought never to repose.") (internal quotation marks omitted). AEDPA's one-year statute of limitations period "quite plainly serves the well-recognized interest in finality of state court judgments." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). Inclusion of an actual innocence exception to the limitations provisions does not foster abuse and delay, but rather recognizes that in extraordinary cases the societal interests of finality, comity, and conservation of scarce judicial resources "must yield to the imperative of correcting a fundamentally unjust incarceration." *Carrier*, 477 U.S. at 495.

Although this Court has not yet determined whether a showing of actual innocence is grounds for overcoming AEDPA's statute of limitations, several circuits are in disagreement about the issue. The Seventh Circuit has held that freestanding

claims of actual innocence are not alone sufficient to merit waiving AEDPA's statute of limitations: "Section 2244(d) has a rule for when new factual discoveries provide a fresh period for litigation; unless that standard is met, a contention that the new discoveries add up to actual innocence is unavailing." *Escamilla v. Jungwirth*, 426 F.3d 868, 872 (7th Cir. 2005). The Eighth Circuit has also held that when a petitioner has failed to show extraordinary circumstances prevented him from timely filing, a claim of actual innocence will not toll the statute of limitations under AEDPA because it "would take the equitable-tolling doctrine far from its original and legitimate rationale." *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002). Similarly, the First Circuit has indicated in dicta that the miscarriage of justice exception would not toll AEDPA's statute of limitations. *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003).

In contrast, the Sixth Circuit has held that Congress "enacted [the AEDPA limitations defense] consistent with the *Schlup* [*v. Delo*, 513 U.S. 298 (1995)] exception. Therefore, equitable tolling of the one-year limitations period on a credible showing of actual innocence is appropriate." *Souter v. Jones*, 395 F.3d at 599. The Tenth Circuit has also stated in dicta that equitable tolling "would be appropriate * * * when a prisoner is actually innocent." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000). Thus, a division exists among the circuit courts as to whether the miscarriage of justice exception compels the conclusion that AEDPA's statute of limitations must give way to a proven claim of mental retardation.

While the First, Fifth, Seventh, and Eighth Circuits have rejected automatic tolling on the basis of credible claims of actual innocence, the Sixth and Tenth Circuits have concluded that AEDPA's statute of limitations must give way for credible claims of actual innocence. Because important constitutional interests are at stake, this Court should resolve the split in the Circuits. *See Triestman v. United States*, 124 F.3d 361, 378-39 (2d Cir. 1997) (finding serious Eighth Amendment and due process concerns if AEDPA's procedural limitations barred habeas petition claiming actual innocence from collateral review).

The clear implication from this Court's line of cases from *Sawyer* to *Dretke* is that AEDPA's statute of limitations must yield to an offender who presents a credible claim of actual innocence of the death penalty. Inclusion of an actual innocence exception to the limitations provisions is also consistent with the underlying principles of the AEDPA. As the conference report stated, one of the purposes of the act was to "curb the abuse of the statutory writ of habeas corpus and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 945.

In this case, Rivera has established his claim of actual innocence with the Fifth Circuit's affirmed finding that Rivera is mentally retarded. *See* Appendix A at App. 31. A remand for an evidentiary hearing on equitable tolling when Rivera has shown that he is actually innocent of the death penalty needlessly

postpones final adjudication of his claim and perversely prolongs the very injustice that the miscarriage of justice standard was designed to prevent.

CONCLUSION

As the Fifth Circuit properly concluded, all of the expert testimony, testimony of teachers and family, and the documentary evidence support the district court's determination that Rivera is mentally retarded. Appendix A at App. 30-31. In light of the relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty, this Court has determined that the death penalty is not a suitable punishment for mentally retarded offenders and that such punishment is excessive under the Eighth Amendment. *Atkins*, 536 U.S. at 317-21. Even though the Fifth Circuit has affirmed the district court's finding that Rivera is mentally retarded, the court of appeals has remanded the case to the district court for an evidentiary hearing to develop the facts on equitable tolling based on its determination that Rivera's habeas petition was untimely.

Rivera timely filed his motion for authorization with an attached proposed habeas petition in the court of appeals. The court of appeals is authorized to transfer the application to the district court and it is considered timely filed as of the date it was filed in

the court of appeals. *See* 28 U.S.C. § 1631; Fed. R. App. P. 22(a). Under these circumstances, Rivera's habeas petition should be considered timely-filed under AEDPA's statute of limitations.

Even assuming Rivera's habeas petition was not timely filed, remand to the district court for an evidentiary hearing on equitable tolling is not required here where Rivera not only has a credible claim of actual innocence of the death penalty, but an established claim of actual innocence of the death penalty. The district court's finding that Rivera is mentally retarded has now been reviewed and affirmed by the court of appeals. Accordingly, AEDPA's statute of limitations must yield.

For the reasons set forth above, Petitioner respectfully prays that this Court grant a writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-70022

Jose Alfredo RIVERA

Petitioner-Appellee

v.

Nathanial QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division

Respondent-Appellant

Appeal from the United States District Court
for the Southern District of Texas

(Filed Oct. 18, 2007)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This is a death penalty case from Cameron County, Texas. Texas appeals from a federal grant of habeas relief on Jose Rivera's *Atkins* claim, arguing that the district court erred in not dismissing his habeas petition as untimely and in finding that

Rivera is mentally retarded. We affirm in part, vacate in part, and remand for further proceedings.

I

The dates and sequence of events are important in this appeal. In May 1994, Rivera was convicted and sentenced to death for murdering three-year-old Luis Daniel Blanco. The Texas Court of Criminal Appeals ("CCA") affirmed his conviction and sentence. His first state habeas petition was denied by the CCA on December 16, 1998; the federal district court denied his first federal habeas petition on October 3, 2001. This court denied a Certificate of Appealability on November 27, 2002. Rivera's execution date was set for August 6, 2003.

On June 20, 2003, Rivera filed a state habeas petition raising an *Atkins*[1] claim for the first time. That was the last day to bring an *Atkins* claim under AEDPA's one-year statute of limitations period.[2] The CCA dismissed Rivera's habeas petition on July 25, 2003. Rivera submitted a suggestion for rehearing to the CCA on August 1, 2003, which the CCA rejected on August 5, 2003. Rivera filed, and the state courts rejected, a final state habeas petition on Wednesday, August 6, 2003.

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[1] *See Atkins v. Virginia*, 536 U.S. 304 (2002).

[2] *In re Hearn*, 376 F.3d 447, 456 n. 11 (5th Cir. 2004); *see* 28 U.S.C. § 2244(d)(1)(C).

Rivera also sought relief in federal court on his *Atkins* claim. On Tuesday, August 5, 2003, he filed a motion for authorization to file a successive petition in this court, as required by 28 U.S.C. § 2244(b)(3)(A). Rivera submitted a proposed successive application for habeas corpus to be attached to the motion for authorization. This court denied his first motion on August 6 as failing to make a prima facie showing of mental retardation; this court could not consider all of the evidence of mental retardation Rivera presented because he had not presented that evidence to the state courts. Rivera then filed another habeas petition with the state court on August 6, presenting the evidence of mental retardation that this court refused to consider.

The state courts rejected his petition the same day, and Rivera filed a second motion for authorization to file a successive petition with this court. Now able to consider all of Rivera's evidence, this court concluded that Rivera had made a prima facie showing of mental retardation, authorized the successive petition on that issue only, and stayed his execution. Rivera filed his habeas petition with the district court on Monday, August 11, 2003.

II

After Rivera filed his habeas petition in the federal district court, the state moved to dismiss the petition as being untimely. The state argued that Rivera "should have filed the writ in federal court at

the absolute latest on Thursday, August 7, 2003." The state also argued in its motion that Rivera was not entitled to any equitable tolling of the statute of limitations.

The district court summarily denied the state's motion to dismiss the petition during a status conference in September 2003, stating: "Denied. You will preserve your exception. We will revisit those matters." At the end of the conference, the state sought to clarify the nature of Judge Vela's denial of its motion to dismiss. The following exchange occurred:

> TEXAS: Your Honor, do I understand that the Court has denied the motion to dismiss filed by the state in its entirety?
>
> COURT: If the state wants to, they can favor me with briefs and the like. I will revisit it. But for right now it stands denied.
>
> TEXAS: That was just what I was going to ask, if you would reconsider
>
> COURT: Yes.

Following the status conference, the parties briefed the mental retardation issue, and Judge Vela held an evidentiary hearing in January 2004. Judge Vela died, however, before rendering a decision. The case was transferred to Judge Hanen, who held a second evidentiary hearing in January 2005. Another round of briefing followed, and Judge Hanen issued a Memorandum Opinion and Order on March 31, 2006, finding Rivera mentally retarded, granting habeas

relief, and permanently enjoining him from being executed. However, Judge Hanen did not revisit Judge Vela's timeliness ruling.

III

The state first argues that Rivera's petition is time-barred under AEDPA.

A

While Rivera's state habeas petitions were pending, AEDPA's statute of limitations was tolled.[3] Thus, the statute of limitations on Rivera's *Atkins* claim was tolled through Wednesday, August 6, 2003, the day on which state proceedings ended.[4] However, because Rivera did not file his state *Atkins* claims until the last day under AEDPA, none of the statute of limitations period remained. Although this court authorized Rivera to file a successive petition raising his *Atkins* claim on Wednesday, August 6, he waited over the weekend to file the application with the

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[3] *See* 28 U.S.C. § 2244(d)(2).

[4] *See Lookingbill v. Cockrell*, 293 F.3d 256, 261 (5th Cir. 2002). The state asks us to limit or distinguish *Lookingbill*. As doing so is not necessary to the outcome of this case and the state did not raise the argument below, we decline to accept the invitation.

district court – filing on Monday, August 11. Therefore, his application was untimely.[5]

B

Nevertheless, as we have explained, "[a] court can allow an untimely petition to proceed under the doctrine of equitable tolling 'in extraordinary circumstances.' We and the district courts, guided by precedent, must examine each case on its facts to determine whether it presents sufficiently 'rare and exceptional circumstances' to justify equitable tolling."[6] "The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable."[7]

Both the state and Rivera would have us decide in the first instance whether equitable tolling is available in this case.[8] Rivera advances three grounds in support of applying the doctrine: (1) that Texas' former two-forum rule delayed by five months the time he could file in state court; (2) that he had no

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[5] This court previously held that filing a motion for authorization to file a successive petition does not satisfy AEDPA's statute of limitations. *See Fierro v. Cockrell,* 294 F.3d 674 (5th Cir. 2002).

[6] *Fisher v. Johnson,* 174 F.3d 710, 713 (5th Cir. 1999) (quoting *Davis v. Johnson,* 158 F.3d 806, 810, 811 (5th Cir. 1998)) (citations omitted).

[7] *Davis,* 158 F.3d at 810 (quoting *Lambert v. United States,* 44 F.3d 296, 298 (5th Cir. 1995)).

[8] *See In re Lewis,* 484 F.3d 793, 796 n. 8 (5th Cir. 2007).

right to counsel, lacked the financial resources to hire counsel, lacked the resources to develop adequately his *Atkins* claim, and lacked the mental capacity to represent himself pro se; and (3) that a proved Eighth Amendment claim requires that AEDPA's statute of limitations give way or that it justifies equitable tolling. We, however, decline the parties' invitation to decide now whether equitable tolling applies.

The record before the court is not sufficiently developed for us to engage in the fact-intensive determination of whether equitable tolling is appropriate. Judge Vela denied the state's motion to dismiss summarily. Despite his explicit invitation to the state to brief and raise again the timeliness issue, the state did not do so before either him or Judge Hanen. Rather, the state switched litigation strategies and focused on the merits of Rivera's *Atkins* claim. The consequence of the state's choice is that a factual record upon which this court could base an equitable tolling decision was not developed before either judge. Considering that we affirm the finding that Rivera is mentally retarded, as discussed below, it would be imprudent for us to proceed in the first instance on the question of equitable tolling, decidedly so given Rivera's second bundle of arguments in favor of equitable tolling – that is, the relationship between his retardation and his ability to pursue habeas relief.

The state baldly asserts that Rivera has never been without counsel since the Supreme Court decided *Atkins*, and thus we need not concern ourselves

with the "hypothetical" problem of a mentally retarded person trying to represent himself pro se. The record, however, is not so certain. It does not clearly reflect whether Rivera had counsel through the entire relevant time period; whether there were gaps in his representation; if there were gaps, why he was without counsel; and the effects of any gaps in representation on Rivera's ability to complete his *Atkins* petition. Because of that uncertainty, *Lewis,* where the court declined to apply equitable tolling, is distinguishable: "Lewis obtained his pro bono counsel on or soon after the day he received notice of his previous counsel's withdrawal, which was March 10, 2003, leaving Lewis with over three months to file his state application."[9]

Nor can we discern why it took over five months for Rivera to file his *Atkins* claim in the state courts. Perhaps the state is correct in its answer, but it assumes attorney error or lack of diligence – an assumption not tested in a hearing. Nor does the record sufficiently develop what particular obstacles Rivera encountered in assembling his *Atkins* claim. For example, it is unclear to what extent he was able to access medical records in the state's control, or exactly how his indigence impacted his ability to develop his claim.

All that is clear is that what occurred during the nearly six months between the end of the first federal

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[9] *Id.* at 797.

habeas proceedings and the filing of Rivera's state petition raising his *Atkins* claim is unclear. Until the underpinnings of what happened and why are made clear, we cannot rule on equitable tolling. Our examples of uncertainties that remain are meant to be illustrative but not exhaustive of what the parties should explore before the district court. Accordingly, we vacate Judge Vela's order denying the state's motion and remand to the district court with instruction to hold an evidentiary hearing, make specific findings, and rule on the issue of equitable tolling.

IV

Although the statute of limitations remains potentially dispositive and we ordinarily would not decide the merits under these circumstances, there are compelling reasons for us to address the merits of Rivera's claim now. First, the merits are squarely before us: we have a developed record, an opinion by the district court, and the parties have fully briefed and argued the merits. Judicial economy favors addressing the merits now. Second, the issue of Rivera's retardation is potentially determinative just as the statute of limitations is. We think it unfair to have the district court and the parties grapple with the difficult question of equitable tolling under the looming possibility that it is all for nought as we might later reverse the finding that Rivera is retarded.

Third, and perhaps most important, the merits blend inseparably into the question of equitable tolling here. The bases for equitable tolling that prompt us to remand – in particular the relationship between Rivera's retardation and his ability to pursue habeas relief – are made the more compelling precisely because Rivera has been adjudicated to be retarded. That is, answering whether Rivera is retarded is logically antecedent – if not a core element itself – to determining whether equitable tolling is available. With this entanglement, leaving Rivera's retardation as an unaffirmed hypothetical risks obscuring the issue of equitable tolling on remand, and has the possibility of detrimentally compromising the record needed to review the district court's decision on remand should the case come back to this court.

Finally, because of the case's procedural posture, we cannot avoid deciding whether the district court erred by not giving AEDPA deference to the CCA's decisions. This inquiry takes us far down the road of examining the merits of Rivera's claim because, as the district court observed, the evidence before it was quite similar to the evidence before the CCA.

A

Before considering the district court's findings, we address the state's argument that Judge Hanen

"was not empowered to apply a *de novo* standard"[10] to Rivera's *Atkins* claim, and was instead required to give AEDPA deference to the CCA's decisions.

The CCA denied both of Rivera's *Atkins* petitions as abuses of the writ, concluding that neither the first petition[11] nor the second supplemented petition[12] made a prima facie showing of retardation. In granting Rivera's motion to file a successive petition after the CCA denied his second petition, this court explained that "characterizing the failure to meet the threshold requirement as an abuse of the writ does not foot the ruling on an independent state ground. This is a determination on the merits."[13] The state argues that, because the CCA's decision was on the merits, AEDPA's deference standards apply. The district court's opinion does not address this issue.

Rivera contends that *Morris v. Dretke*[14] controls whether deference is due; however, this is not so. *Morris* held that where new evidence merely supplements an *Atkins* claim that was presented to the state courts, AEDPA's exhaustion requirement is satisfied. We also noted that, "[i]n cases where the

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[10] State-Appellant's Brief at 51.

[11] *Ex parte Rivera*, No. 27065-02, 2003 WL 21752841 (Tex. Crim. App. July 25, 2003).

[12] *Ex parte Rivera*, No. 27065-03 (Tex. Crim. App. Aug. 6, 2003).

[13] *In re Rivera*, No. 03-41069 (5th Cir. Aug. 6, 2003).

[14] 413 F.3d 484 (5th Cir. 2005).

legal question is whether the new evidence a petitioner puts forth for the first time on federal habeas on a particular claim already asserted on state habeas is exhausted under § 2254(b), subparts (d) and (e) of § 2254 concerning 'factual development' are not implicated."[15] This, however, does not mean deference is not due: "The State is correct to argue that our review of the Court of Criminal Appeals' judgment must be conducted under [AEDPA's] deferential standard."[16]

Under AEDPA, if a state court has adjudicated a habeas petitioner's claims on the merits, he may receive relief in the federal courts only where the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[17] We apply the same standards as the district court in reviewing a decision of the state court.[18]

A state court's decision is "contrary to" clearly established federal law if "the state court applies a

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[15] *Id.* at 498.

[16] *Id.* at 501 (Higginbotham, J., concurring); *see, e.g., Moreno v. Dretke,* 450 F.3d 158 (5th Cir. 2006).

[17] 28 U.S.C. § 2254(d).

[18] *Woods v. Quarterman,* 493 F.3d 580, 584 (5th Cir. 2007).

rule that contradicts the governing law announced in Supreme Court cases, or . . . the state court decides a case differently than the Supreme Court did on a set of materially indistinguishable facts."[19] "A state court decision constitutes an 'unreasonable application' of clearly established federal law . . . if the court 'identifies the correct governing legal principle from Supreme Court precedent, but applies that principle to the case in an objectively unreasonable manner.' "[20] If the state court's decision runs afoul of these limits, then federal court review "is unencumbered by the deference AEDPA normally requires."[21] We conclude that the CCA's dismissal of Rivera's second supplemented petition as failing to make a prima facie showing was an unreasonable application of clearly established federal law.

Rivera's second petition contained a report by Dr. Richard Garnett. Garnett analyzed the then-available evidence of Rivera's retardation, which included various TDCJ medical records; records from treatment at a MHMR facility for alcohol and drug abuse; records from the Windham School District; Brownsville public school records; affidavits of teachers at Rivera's school; affidavits of family members of Rivera; letters written by Rivera to family members; and reports from medical, psychological, and educational

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[19] *Id.* (quoting *Nelson v. Quarterman*, 472 F.3d 287, 292 (5th Cir. 2006)) (internal quotations omitted).

[20] *Id.* (quoting *Nelson*, 472 F.3d at 292).

[21] *Panetti v. Quarterman*, 127 S. Ct. 2842, 2855 (2007).

sources. Garnett concluded that this evidence "suggest[s] that Mr. Rivera is mentally retarded and there is no information which could rule out the diagnosis."

Garnett explained that Rivera had never taken a valid, full length IQ test, and that the tests he had taken to date were "not valid indicators of intellectual functioning." Based on a review of Rivera's school records and achievement testing, Garnett stated that "as an adult, Mr. Rivera was performing academically at the level of a 10 year old." Garnett specifically noted that Rivera needed to take a full length, reliable IQ test.

Garnett's report also indicated that the evidence suggested that Rivera had deficits in adaptive functioning in multiple areas, including: functional academic skills, work, self direction, communication, health, and self care. The evidence further indicated onset prior to age 18.

The report was directly responsive to the gaps that the CCA identified in denying Rivera's first *Atkins* habeas petition. As to intellectual functioning, the report went beyond mere recitation of grades to describe Rivera's sustained pattern of academic difficulties, and it analyzed Rivera's performance on various achievement tests while in school. The report explained why the IQ tests Rivera had taken to date could not be relied on, and also detailed deficits in

adaptive functioning beyond Rivera's work problems.[22]

The then-available evidence and Dr. Garnett's report raised serious questions about Rivera's possible retardation. Faced only with the threshold question of whether to allow Rivera's claim to proceed, it was unreasonable on the record before the CCA to reject Rivera's *Atkins* claim as failing to even establish a prima facie case – especially when viewed through the prism of *Atkins*' command that "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."[23]

The district court's ruling that Rivera had exhausted his *Atkins* claim before the state court – which the state understandably does not discuss – strengthens the conclusion that the CCA's decision was unreasonable. We explained in *Morris* that the presentation of "evidence [in the federal courts] that places [a petitioner's] claims in a significantly different legal posture must first be presented to the state courts."[24] Here, the district court held that although it

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[22] In dismissing Rivera's first *Atkins* petition, the CCA described the evidence regarding Rivera's adaptive functioning as follows: "Other than allegations that he did not work much, there is no evidence of deficits in adaptive behavior."

[23] *Atkins*, 536 U.S. at 321.

[24] 413 F.3d at 491 (quoting *Anderson v. Johnson*, 338 F.3d 382, 387 (5th Cir. 2003)).

had evidence before it that was not presented to the state court, there was no exhaustion problem:

> [T]he quality of the evidence presented in support of Rivera's habeas petition is strikingly similar both in terms of the type and the amount of factual presentations made in state court, and in terms of the qualitative improvement in the evidence made in the federal *Atkins* presentation due to the additional evidence obtained after the state habeas proceedings had concluded.

In short, the district court was considering a body of evidence that did not "fundamentally alter"[25] Rivera's retardation claim. From the "strikingly similar" evidence, the district court found that Rivera was retarded. That this body of evidence can support a finding of retardation, which we affirm below, points strongly to the conclusion that the CCA's decision that Rivera had not made a prima facie showing was unreasonable.

The unreasonableness of the CCA's decision is further compounded by its procedural effect: the finding that Rivera had not made a prima facie showing deprived Rivera of the opportunity to develop fully the substance of his claim before the state courts. *Atkins,* like *Ford v. Wainwright,*[26] "[left] to the State[s] the task of developing appropriate ways to

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[25] *Id.*

[26] 477 U.S. 399 (1986).

enforce the constitutional restriction upon [their] execution of sentences."[27] *Ford* is instructive because of the similarity of the competency and mental retardation issues: both decisions affirmatively limit the class of persons who are death penalty eligible. While *Atkins* itself did not specifically impose the sort of procedural requirements that *Ford* mandates, neither did *Atkins* purport to sweep away the protections of due process.

Under *Ford*, "[o]nce a prisoner seeking a stay of execution has made a 'substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness."[28] As Justice Powell explained, due process does not require a full trial on the merits, but a process that affords the prisoner an "opportunity to be heard."[29]

For our purposes, we are concerned with the Supreme Court's application of *Ford* in *Panetti v. Quarterman*. In *Panetti*, the prisoner had made a "substantial showing of incompetency," but according to the prisoner, the state failed to provide him with procedures in conformity with *Ford* to develop his

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[27] *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 405, 416-17).

[28] *Panetti*, 127 S. Ct. at 2856 (quoting *Ford*, 477 U.S. at 426 (Powell, J., concurring in part and concurring in the judgment)).

[29] *Ford*, 477 U.S. at 424 (Powell, J., concurring in part and concurring in the judgment).

claim. This failure, the prisoner argued, rendered the state's decision denying his incompetency claim an unreasonable application of clearly established federal law. The Supreme Court agreed:

> The state court's failure to provide the procedures mandated by *Ford* constituted an unreasonable application of clearly established law as determined by this Court. It is uncontested that petitioner made a substantial showing of incompetency. This showing entitled him to, among other things, an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court. And it is clear from the record that the state court reached its competency determination after failing to provide petitioner with this process. . . . As a result of this error, our review of petitioner's underlying incompetency claim is unencumbered by the deference AEDPA normally requires.[39]

Even though *Atkins* did not specifically mandate any set of procedures, it was decided against the backdrop of the Supreme Court's and lower court's due process jurisprudence. The lesson we draw from *Panetti* is that, where a petitioner has made a prima facie showing of retardation as Rivera did, the state court's failure to provide him with the opportunity to develop

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[39] *Panetti*, 127 S. Ct. at 2855.

his claim deprives the state court's decision of the deference normally due.[31]

The Court's decision in *Ake v. Oklahoma*[32] is relevant to the extent that Texas' abuse of the writ doctrine is potentially a procedural bar to our review.[33] The substantive issue in *Ake* was whether the Constitution requires a state to provide assistance to an indigent defendant when there is a serious question about the defendant's sanity at the time of the offense. However, the Court faced a threshold issue of whether an adequate and independent state ground – the state's waiver rule – deprived it of jurisdiction. The Court held that it did have jurisdiction as the application of the state's procedural rule turned on an antecedent determination of federal law: "Before applying the waiver doctrine to a constitutional

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[31] *See also id.* at 2859 ("Here, due to the state court's unreasonable application of *Ford*, the factfinding procedures upon which the court relied were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.' We therefore consider petitioner's claim on the merits and without deferring to the state court's finding of competency." (citation omitted)); *Taylor v. Horn*, ___ F.3d ___, No. 04-9016, 2007 WL 2728668, at *34 n. 12 (3d Cir. Sept. 20, 2007) ("We appreciate that if a competency hearing was not held when it ought to have been, in accordance with minimal federal standards of procedural due process, then no deference is due to a state court's competency determination.").

[32] 470 U.S. 68 (1985).

[33] The state did not raise the issue. However, because it implicates our jurisdiction, we address the question.

question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question."[34] The necessity of examining the merits of the federal law issue to decide the applicability of the state procedural rule meant that "the state-law prong of the court's holding is not independent of federal law."[35]

The application of Texas' abuse of the writ doctrine to *Atkins* claims is entangled in federal law in much the same way as Oklahoma's waiver doctrine was in *Ake*; "in the *Atkins* context, Texas courts have imported an antecedent showing of 'sufficient specific facts' to merit further review, rendering dismissal of such claims [as abuses of the writ] a decision on the merits."[36] That is, to decide whether an *Atkins* claim is an abuse of the writ, the CCA examines the substance of the claim to see if it establishes a prima facie case of retardation, and only upon deciding that question can the state court decide whether remand is appropriate.[37] Thus, a decision that an *Atkins*

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[34] *Ake*, 470 U.S. at 75.

[35] *Id.*

[36] *Morris*, 413 F.3d at 500 n. 4 (Higginbotham, J., concurring).

[37] For example, in rejecting Rivera's first petition presenting his *Atkins* claim, the CCA concluded by stating that "[a] remand of a subsequent application raising an *Atkins* claim is appropriate when an applicant sets out sufficient facts to raise a *bona fide* claim of mental retardation, but in the instant cause [Rivera] has failed to make this threshold showing. Because of [Rivera's] failure to produce 'sufficient specific facts' to support

(Continued on following page)

petition does not make a prima facie showing – and is, therefore, an abuse of the writ – is not an independent state law ground.

This does not mean that states may not use procedural devices and doctrines – independent and adequate state law grounds – to ferret out frivolous or meritless claims, thereby preventing federal review.[38] Nor does it mean that states must give hearings to persons with such claims as *Ford* makes clear. But it does mean that, where the threshold a state sets turns on a merits determination of federal law or fails to make clear that it is procedural in nature, that decision is reviewable.[39] Although Texas' abuse of the writ doctrine is superficially procedural in that it has

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an *Atkins* claim, we dismiss [Rivera's] subsequent writ application as an abuse of the writ. . . ." Of course, this court has held in other circumstances that Texas' abuse of the writ doctrine is an adequate and independent state law ground, *see Barrientes v. Johnson*, 221 F.3d 741, 759-61 (5th Cir. 2000); *Emery v. Johnson*, 139 F.3d 191, 195-96 (5th Cir. 1997), but the merits showing now incorporated for *Atkins* claims changes the character of the doctrine.

[38] *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *Wright v. Quarterman*, 470 F.3d 581, 586 (5th Cir. 2006) ("A federal court may not grant a petition for a writ of habeas corpus where the state court expressly denied the claim based on an independent and adequate state procedural rule.").

[39] *See Harris v. Reed*, 489 U.S. 255, 263-65 (1989) ("Having extended the adequate and independent state ground doctrine to habeas cases, we now extend to habeas review the 'plain statement' rule for determining whether a state court has relied on an adequate and independent state ground."); *Hogue v. Johnson*, 131 F.3d 466, 492-93 (5th Cir. 1997).

a procedural effect, determining which claims are remanded to the state trial courts for further development, it steps beyond a procedural determination to examine the merits of an *Atkins* claim. For an *Atkins* claim, the merits determination is at a minimum "interwoven" with the constitutional prohibition against executing the mentally retarded.[40]

This case stands in contrast to *Moreno v. Dretke*.[41] The CCA concluded that Moreno failed to make a prima facie showing of retardation, dismissing his petition as an abuse of writ. This court affirmed the district court's holding that the CCA's decision was entitled to AEDPA deference. Moreno attempted to show subaverage intellectual functioning by submitting an IQ test taken in 2003 on which he scored a 64.[42] The test administrator, however, qualified his test score, concluding that the "results probably reflect the lowest level of his abilities."[43] The test administrator commented that Moreno may not have given his best effort and may have "exaggerated any

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[40] *Hogue*, 131 F.3d at 493 ("In *Young* we likewise recognized that a necessary 'predicate' to the application of the *Harris* rule is that the decision of the last state court to which the petitioner presented his federal claims most fairly appear to rest primarily on federal law or to be interwoven with federal law." (quoting *Young v. Herring*, 938 F.2d 543, 553 (5th Cir. 1991) (en banc)) (internal quotation marks omitted)).

[41] 450 F.3d 158 (5th Cir. 2006).

[42] *Id.* at 164.

[43] *Id.*

possible deficits."[44] The administrator went on to comment that "Moreno's speech was 'free of articulation errors,' he expressed himself appropriately and coherently, and his 'cognitive processing speed was unremarkable.'"[45] Moreno attempted to demonstrate deficits in adaptive functioning through a history of substance abuse and his attendance in special education classes. However, the "*only* evidentiary support for that claim was the psychologist's report reciting *Moreno's self-reported educational background.* He could not identify any specific special education classes or provide documentation of those classes."[46] In contrast, there was "substantial" evidence that Moreno did not suffer from deficits in adaptive functioning.

The evidence Rivera presented to make his prima facie showing of retardation was much stronger than Moreno's. As summarized in Garnett's report, Rivera presented school records documenting a long, sustained pattern of academic difficulties. And, again, Rivera's achievement scores demonstrated that "as an adult, Mr. Rivera was performing academically at the level of a 10 year old." Garnett also concluded that the available evidence indicated deficits in adaptive functioning other than academic achievement, such as in work, health, and self care. Garnett's analysis of

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[44] *Id.*

[45] *Id.*

[46] *Id.* (emphasis added).

Rivera's evidence and his conclusion that it "suggest[s] that Mr. Rivera is mentally retarded and there is no information which could rule out the diagnosis" was itself potent evidence.

As the CCA's decision was an unreasonable application of federal law, the district court did not err by considering Rivera's claim without deference to it.

B

The state next argues that the district court erred in finding that Rivera was mentally retarded. The test for mental retardation is (1) significantly subaverage intellectual functioning; (2) accompanied by related limitations in adaptive functioning; and (3) onset prior to the age of eighteen.[47] We review the district court's factual determinations for clear error, while we review *de novo* conclusions of law.[48] "A finding is clearly erroneous only if it is implausible in the light of the record considered as a whole."[49]

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[47] *See Atkins*, 536 U.S. at 308 n. 3, 318; *In re Salazar*, 443 F.3d 430, 432 (5th Cir. 2006); *Ex parte Briseno*, 135 S.W.3d 1, 7-8 (Tex. Crim. App. 2004).

[48] *Woods*, 493 F.3d at 584.

[49] *St. Aubin v. Quarterman*, 470 F.3d 1096, 1101 (5th Cir. 2006).

C

The district court did not clearly err in finding that Rivera suffered from significantly subaverage intellectual functioning. Rivera scored a 68 on the Wechsler Adult Intelligence Scales (WAIS-III) IQ test, a test which both parties agree is the best full-scale IQ test available in English.[50] Texas argues that Rivera's expert misinterpreted this score. According to Texas, Rivera's verbal IQ score of 66 is unreliable, and dragged down his overall result. Texas concedes that Rivera speaks English, but explains that because Rivera is bilingual, he "processes English and Spanish in competition." This competition, Texas' expert argued, made Rivera's verbal score unreliably low. Texas' expert conceded that the IQ test was properly given in English, but then testified that a responsible clinician would have "qualified" the results in light of cultural factors, such as language. In support, he noted that the WAIS-III record form includes a section titled "Behavior Observations," which asks, "Is English native language? If not, indicate examinee's level of fluency; indicate expressive/receptive problems, unusual verbalizations."

The district court rejected this testimony, crediting instead the testimony of Dr. Gilda Kessner, the psychiatrist who administered the IQ test. Kessner

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[50] *See also Atkins*, 536 U.S. at 309 n. 5 (describing "the Wechsler Adult Intelligence Scales test (WAIS-III) [as] the standard instrument in the United States for assessing intellectual functioning").

testified that she followed the appropriate process for determining whether the test could be administered in English. She testified that she spoke with Rivera before the test, discussing his background, his substance abuse history, his work history, and his ability to communicate with the guards. She testified that during the test he spoke in English, she had no communication problems with him, and that if she thought his English was a problem, she would not have given him the test. Garnett offered testimony that supported Kessner's testimony, and three state witnesses, prison guards and counselors, also testified that they converse with Rivera in English and without communication difficulties.

Rivera also notes that the WAIS-III takes into account bilingual examinees, as it was normed to include age groups, geographic regions, gender, and Hispanic and Black Americans. Because of this, Rivera argues, it would alter the reliability of the test to "qualify" the verbal score.

The district court did not clearly err in crediting the testimony of the doctor who administered the IQ test. As Texas' expert acknowledged, "the clinician must ultimately make the decision. . . . It must come down to clinical judgment"; "it has to come down to a clinician's decision, even with test scores, even with the history."

Texas next argues that the district court erred in rejecting four pre-*Atkins* IQ scores of 70, 85, 92, and 80. The scores were not from full-scale Wechsler tests.

The latter three scores resulted from screening tests used in the prison system, and the score of 70 was mentioned in Rivera's school records. Texas concedes that the two Beta-II scores, 85 and 92, correlate only moderately with the Wechsler tests. According to the state's expert, "[T]he correlation coefficients between the Beta-II IQs and WAIS Full Scale IQs ranged between .64 and .66. These moderate range coefficients are quite acceptable, especially when used as a screening instrument." Texas' expert also cited a study that found that Beta tests tend to underestimate intelligence. Texas defends the short form Wechsler score of 80, noting that although the short form is "considered less reliable," its scores correlates closely with long form scores.

Rivera replies that the district court did not "reject" these pre-*Atkins* tests, but it simply gave them less weight. The district court stated that "each score should be of some, but not controlling, weight" because of the "paucity of details surrounding their administration and scoring." The district court "note[d] that the circumstances surrounding the [] administration [of the four tests] are either totally unknown or were less than ideal." The expert testimony and literature before the court "suggest[ed] that one sacrifices accuracy for speed when one administers tests designed for screening purposes." Garnett testified that IQ tests given in the criminal justice system "don't hold much weight" because of the wide variation.

The district court concluded that the pre-*Atkins* IQ tests did not have "a degree of sufficient reliability to satisfy this Court," but that does not mean the court "rejected" the tests. Rather, the district court considered the available IQ test data and offered a reasoned basis for how it weighed the tests in its analysis. We find no clear error in the district court's determination that Rivera has significantly subaverage intellectual functioning.

D

The district court did not clearly err in finding that Rivera suffered from related limitations in adaptive functioning. There was evidence that Rivera was always dirty, slept outside underneath his house, did not play games or read, consistently had academic problems, and was unemployed. The district court found that Rivera displayed adaptive deficits prior to the age of 18 in the areas of self-care, social skills, home living, and functional academics.

The state does not dispute that Rivera has adaptive limitations.[51] As its expert testified, Rivera has adaptive limitations in more than two categories.

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[51] *See* State-Appellant's Brief at 47 ("Although the Director agrees that Rivera's drug history helps explain, in part, his adaptive deficits . . . the court errs in overstating the impact of the record evidence."); *id.* at 48 ("The Director has always maintained that two chief factors – Rivera's inhalant abuse and his antisocial personality – negatively impacted almost all categories of adaptive functioning.").

Rather, Texas argues that these adaptive deficits might have been attributable to Rivera's abuse of inhalants, not to his mental retardation, and that the district court did not find otherwise. Texas argues that there is no proof that Rivera's drug use caused his mental retardation before the age of 18, and that it is just as likely that his early adaptive deficits were manifestations of an intelligent man on drugs. Even the district court acknowledged this, Texas argues, when it stated that "deficits may or may not have been caused by Rivera's diminished intellectual capacity. It is just as likely that these adaptive deficits were caused by his long-term drug abuse."

We read this quote charitably, in support of the district court's own ruling. The district court was likely distinguishing only between etiologies, remarking that some of the deficits were caused by mental retardation from inhalants, and some were caused by mental retardation from other factors. Retardation has, as the experts in this case all agreed, a number of etiologies.[52]

As the CCA has noted, the adaptive behavior criteria are "exceedingly subjective."[53] The district

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[52] The Supreme Court noted in *Atkins* that mental retardation "has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." 536 U.S. at 309 n. 3 (quoting *Diagnostic & Statistical Manual of Mental Disorders* 41 (4th ed. 2000)).

[53] *Briseno*, 135 S.W.3d at 8.

courts each held extensive evidentiary hearings, which included testimony on this issue from, among other witnesses, Rivera's family members and teachers, and multiple experts. That this case presents, in Judge Hanen's words, "a close call" strengthens the need to be mindful of the district court's conclusions. Judge Hanen, having actually presided over the second evidentiary hearing, is in a better position than this court to judge and weigh the credibility of the witnesses who testified on the extent, duration, and causes of Rivera's adaptive functioning limitations.[54]

Based on the expert testimony, testimony of teachers and family, and the documentary evidence, the district court's determination is not implausible and, therefore, survives clear error review.

E

Nor did the district court clearly err in finding onset before age 18. The district court specifically found that "Rivera displayed adaptive deficits prior to the age of 18." And, although Rivera did not take the WAIS-III test prior to age 18, the district court found that the combination of his score of 68, other evidence

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[54] *See id.* at 9 (recognizing the role of experts in determining mental retardation, but cautioning that "the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, *based upon all of the evidence and determinations of credibility*" (emphasis added)).

of Rivera's intellectual functioning, and his performance in school "establish that Rivera had significantly subaverage intellectual functioning prior to the age of 18." The record provides sufficient support for both findings.

As the district court did not clearly err in determining Rivera had significantly subaverage intellectual functioning, related adaptive functioning deficits, and onset before 18 – in short, that Rivera satisfied all three prongs for demonstrating mental retardation under *Briseno* – we affirm the finding that Rivera is mentally retarded.

V

For the foregoing reasons, we AFFIRM in part, VACATE in part, and REMAND for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS —BROWNSVILLE DIVISION—

JOSE ALFREDO RIVERA	§	
VS.	§	CIVIL NO. B-03-139
DOUG DRETKE, Director, Texas Department of Criminal Justice, Institutional Division	§ § § §	(Filed Mar . 31, 2006)

Memorandum Opinion and Order

In May 1994, Jose Alfredo Rivera (hereinafter "Rivera" or "Petitioner") was convicted and sentenced to die for the brutal rape and murder of Luis Daniel Blanco, a three-year-old boy.[1] After his conviction and sentence, Rivera was denied habeas relief at every turn in both state and federal court. Hours before his scheduled execution, the United States Court of Appeals for the Fifth Circuit granted him a stay of execution pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), based upon his claim that he is mentally retarded. It has been left to this Court to determine whether Rivera is indeed mentally retarded and, therefore, exempt from the death penalty under the laws of the State of Texas.

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[1] Parts of the record refer to the victim as Daniel Luis Blanco.

I. BACKGROUND

The facts and circumstances of Petitioner's underlying crime are particularly heinous, and it is hard to imagine a more pointless crime or one with more aggravating circumstances. On July 10, 1993, the body of Luis was discovered floating face down in a resaca located in Lincoln Park in Brownsville, Texas.[2] His shorts and tennis shoes were found in the water near his body. A ligature created from the waistband of his underwear was tied around his neck and the police observed signs that he had been sexually molested. Shortly thereafter, police took Veronica Zavala, a neighbor of the Blanco family, into custody. She gave a statement implicating Petitioner in the murder and he was then also taken into custody. After tendering two somewhat contradictory written statements to law enforcement officials, Rivera personally led Brownsville police officers on a guided tour of the crime scene, which was captured on film for presentation to the jury. Rivera told officers about how he had encountered Zavala, who was babysitting Luis, while walking through Lincoln Park in the middle of the afternoon. They began to talk and soon thereafter began ingesting cocaine. Subsequently, they had sexual relations with each other and then decided to rape the young victim. After sexually assaulting Luis, they used his underwear to strangle

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[2] A resaca, or an oxbow lake, is a type of waterway that resembles a canal or small river. Resacas can be spotted throughout Brownsville and the Rio Grande Valley.

him and then dumped his body into the nearby resaca.

Rivera was tried in Cameron County, Texas, where a jury found him guilty and assessed the death penalty.[3] His sentence was appealed and affirmed by the Texas Court of Criminal Appeals in an unpublished opinion. *Rivera v. State,* No. 71,916 (Tex. Crim. App. Mar. 6, 1996 (unpublished)). Rivera did not file a petition for a writ of certiorari. In 1997, Rivera next sought relief via a state habeas corpus application. This application was denied the next year and affirmed by the Texas Court of Criminal Appeals in another unpublished opinion. *Ex parte Rivera,* No. 27,065-01 (Tex. Crim. App. Dec. 16, 1998 (unpublished)).

Following that affirmance, Rivera sought relief in federal court for the first time. *Rivera v. Johnson,* No. 1:99CV123 (S.D. Tex. filed Jan. 11, 1999). His 1999 habeas petition raised 24 different grounds. In 2001, United States Magistrate Judge John William Black issued a Report and Recommendation in which he

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[3] This Court notes that Rivera now claims that Zavala has recanted or at least tried to recant the statements she made implicating him in the murder. The record contains copies of letters that she has written claiming that he is innocent and that she was the sole perpetrator of the crime. These letters contradict her prior statements to Brownsville police officers in which she stated that both she and Rivera murdered the victim. The Fifth Circuit, however, has rejected Rivera's actual innocence claim and that issue is not before this Court. *In re Rivera,* No. 03-41065, 10-11 (5th Cir. Aug. 6, 2003).

advised the district court to deny Petitioner's motion for an evidentiary hearing, grant the state's motion for summary judgment, and deny all habeas relief. 1:99CV123 at Docket No. 54. That recommendation was adopted by this Court's predecessor, the late Judge Filemon B. Vela. 1:99CV123 at Docket No. 67.

Rivera appealed to the Fifth Circuit. The Fifth Circuit essentially upheld the reasoning of Judge Black as adopted by Judge Vela and denied a certificate of appealability on all claims. *Rivera v. Cockrell,* No. 01-41317 (5th Cir. Nov. 27, 2002). It also denied Rivera's request for a stay of execution.

In the meantime, the Supreme Court of the United States decided the case of *Atkins v. Virginia,* 536 U.S. 304 (2002). In essence, the majority of the Supreme Court held that the death penalty was a cruel and unusual punishment when applied to mentally retarded capital offenders.[4] *Id.* at 316. The majority's conclusion relied on its review of what it described as a "national consensus" and its feeling that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the

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[4] Similar reasoning has subsequently been used by the Supreme Court to hold that those under the age of 18 who commit capital crimes cannot be executed. *See Roper v. Simmons,* 543 U.S. 551 (2005). In an ironic turn of events, on remand, the petitioner in *Atkins* was found to not be mentally retarded. Maria Glod, *Va. Killer Isn't Retarded, Jury Says; Execution Set; Case Prompted Supreme Court Ruling*, WASH. POST, Aug. 6, 2005, at A01.

progress of a maturing society." *Id.* at 311-12 (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1958)). The majority wrote:

> Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the state's power to take the life" of a mentally retarded offender.

Atkins, 536 U.S. at 321 (quoting *Ford v. Wainwright,* 477 U.S. 399, 405-06 (1986)).[5]

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[5] This Court will confine its discussion of *Atkins* to those topics that are pertinent to the issues that relate to the issue of mental retardation. It goes without saying that the *Atkins* decision, as well as *Roper,* have been roundly criticized. Various critics and commentators have levied criticism at *Atkins* for:

1. Ignoring their own precedents, including the case of *Penry v. Lynaugh,* 492 U.S. 302 (1989);
2. Using what it deemed a "national consensus," trends, and polls to determine the constitutionality of Virginia law;
3. Using the views of religious and professional advocacy groups as well as foreign law to support its conclusion.
4. Adopting an "evolving standard" for the interpretation of the Eighth Amendment;
5. Ignoring the plight of the victims of crime and their families;
6. Ignoring the will of the citizens and representatives of states whose laws they have invalidated; and

(Continued on following page)

Subsequent to the *Atkins* decision, Rivera filed a new habeas petition in state court claiming that he is mentally retarded and that he is innocent of the crime of which he was convicted. This petition was denied and Rivera appealed. In its order dismissing Rivera's subsequent application, the Texas Court of Criminal Appeals discussed the fact that the evidence in support of Rivera's claim of mental retardation was unconvincing. *Ex parte Rivera,* No. 27,065-02 (Tex. Crim. App. July 25, 2003). Briefly summarized, the court described the evidence as consisting of:

1. Elementary school records indicating poor grades, frequent absences, and repeated years;

2. Middle school records up to the age of 17 when he eventually dropped out of the ninth grade;

3. Affidavits from three of Rivera's sisters that recount his difficulties in learning, his inability to perform basic life skills, and his repeated drug usage (primarily inhalant abuse that began at a young

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7. Ignoring the various safeguards already in place in most jurisdictions that protect the rights of those accused of capital crimes.

This Court feels no need to venture into a discussion or analysis of the merits of *Atkins* or any of these criticisms as they are not at issue in this matter. Further, this Court is compelled to follow the dictates of *Atkins* regardless of any points of agreement or disagreement with its holding or reasoning. Thus, any discussion would not only be dicta, but also pointless.

age and continued throughout his childhood);

4. Various medical records, none of which contain a diagnosis of mental retardation;

5. Records indicating that Rivera achieved a General Equivalency Diploma ("GED") in 1980;[6] and

6. Prison records indicating that he had been given Intelligence Quotient ("IQ") tests while in prison (for a previous unrelated conviction).[7]

The Texas Court of Criminal Appeals found that this inconclusive mixture of anecdotal evidence failed to produce "sufficient specific facts" to raise a prima facie claim of mental retardation and dismissed his subsequent application for a writ of habeas corpus as an abuse of discretion under Article 11.071 § 5(a) of the Texas Code of Criminal Procedure.

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[6] The record before this Court indicates that Rivera dropped out of the GED program in which he was enrolled never having completed it.

[7] These scores, though below average, were not within the range that would indicate mental retardation. As will be discussed in greater detail below, these test scores were specifically an 85 on a Beta II test given in June 1991 and a 92 on a Beta II test given in February 1992. During his current incarceration, he received an 80 on a short-form WAIS-R test given in June 1994.

Shortly thereafter, Rivera sought permission from the Fifth Circuit to file a successive federal habeas petition. *In re Rivera,* No. 03-41065 (filed Aug. 5, 2003). Relying on its prior opinion in *In re Morris,* 328 F.3d 739 (5th Cir. 2003), the court opined that the standard needed to bring a successive writ claiming mental retardation is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Rivera,* No. 03-41065, 4 (5th Cir. Aug. 6, 2003) (quoting *In re Morris,* 328 F.3d at 740). The Fifth Circuit referenced the three-prong standard for determining the existence of mental retardation set forth by the American Association on Mental Retardation ("AAMR") and a similar standard set forth by the American Psychiatric Association ("APA") generally requiring: (1) subaverage intellectual functioning; (2) co-existing with two or more limitations in adaptive skills (such as communication, self care, home living, social skills, self direction, health, and safety); and (3) onset of both 1 and 2 prior to the age of 18.

At the time of its opinion, the Fifth Circuit had before it a report on Petitioner from Dr. Richard Garnett that had not been presented to any state tribunal. While not going so far as to diagnose Rivera as mentally retarded, Dr. Garnett reviewed the evidence presented to the state court and postulated that Rivera's history and characteristics were consistent with those "persons with mental retardation." Seemingly, the inability to make a firm diagnosis stemmed from the fact that an adequate IQ test

(presumably with a low score) had never been administered to Rivera.[8]

The Fifth Circuit agreed with the Texas Court of Criminal Appeals that no prima facie case had been made, and noted that the Texas appellate court had declined to rule on the merits of Rivera's application. *Rivera,* No. 03-41065, at 10. In fact, the Fifth Circuit went one step further and denied authorization for Rivera to file an actual innocence claim. *Id.* at 11.

As soon as the Fifth Circuit ruled, the Texas Court of Criminal Appeals reversed course and decided to consider the evidence (including the submission of Dr. Garnett) that it had originally refused to consider. *Ex parte Rivera,* No. 27,065-03 (Tex. Crim. App. Aug. 6, 2003). Despite taking that evidence into consideration, the Texas Court of Criminal Appeals issued an opinion reiterating its first holding that the threshold requirement had not been met and dismissed Rivera's cause as an abuse of the writ.

Based upon this turn of events, the Fifth Circuit reheard the case and determined that the Texas Court of Criminal Appeals' latest action was an actual ruling on the merits. *In re Rivera,* No. 03-41069 (5th Cir. Aug. 6, 2003). The Fifth Circuit ruled that Rivera had made a sufficient showing to be authorized to

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[8] The Fifth Circuit opinion later explains that the state court denied a request made by Rivera's counsel for funds to retain an expert to perform the needed testing. *In re Rivera,* No. 03-41065 at 9.

proceed "only on his claim of mental retardation." *Id.* at 2. Given that finding, the Fifth Circuit authorized the successive writ, stayed the execution, and directed this Court to proceed. *Id.*

This case, being a "subsequent" or successive writ, was assigned to United States District Judge Filemon B. Vela – the judge who presided over Rivera's first federal habeas petition. The issue was briefed and an evidentiary hearing was held in January 2003. More briefing ensued. Prior to issuing his ruling, however, Judge Vela was stricken with cancer and passed away.

This case was then reassigned to the undersigned judge. This Court held various phone conferences with the parties after it had fully reviewed the prior pleadings and the entire record, including the transcripts from the evidentiary hearing held before Judge Vela. In order to be fair to both sides, and in order that there should be no question about the propriety of this Court's proceedings, the Court offered to hold another evidentiary hearing so that both sides could fully present any evidence that they had not had an opportunity to present, and so that the Court, if the parties believed it was necessary, would have the opportunity to actually view the witnesses that had already testified. This offer was turned down by both sides. *See* Transcript of Tel. Conf. June 2, 2004.

The Court, however, still had certain questions it felt needed to be answered based upon its review of

all that had transpired since Rivera's first petitions for habeas relief were denied in both state and federal court. To fill that informational void, the Court considered appointing its own expert and it eventually entered a show cause order to ascertain why it should not follow that course of action. *Docket No. 55.* Both parties opposed the prospect of a court-appointed expert.[9] *See Docket Nos. 57 & 58.* In light of the fact that both parties objected, the Court deemed its best option would be to hold a show cause hearing at which it could see, hear, and question the experts who had previously testified and then determine whether a court-appointed expert was warranted. The second evidentiary hearing was held on January 14, 2005.

Following that hearing, extensive briefing, and the Fifth Circuit's decision in *Morris v. Dretke,* 413 F.3d 484 (5th Cir. 2005), the Court is now in a position to rule on the entire case without the appointment of a new expert. In making its ruling, this Court relies not only on the evidence that was addressed at the hearing over which it presided, but also on the evidence introduced at the hearing over which Judge Vela presided. There was no objection and, in fact, there was a general agreement that the Court could look at the evidence from both hearings. Indeed, it

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[9] Some of the opposition included a fallback argument that if the Court was to follow such a course, then the parties would suggest that the expert have a very limited role – so limited, in fact, that if the Court followed this suggested course of action, the expert would be of little or no value to the Court.

has reviewed that evidence (both the exhibits and the testimony) in great detail and is relying on the evidence from both *Atkins* hearings in making its current ruling.

II. The Exhaustion Problem

The first issue before this Court is both procedural and evidentiary in nature. After the Fifth Circuit directed this Court to consider the *Atkins* issue, and before the first *Atkins* hearing was held before Judge Vela, Rivera was examined and given an IQ test. Therefore, this Court has evidence before it that has never been presented to any court in support of Rivera's *Atkins* claim.[10] Thus, the initial issue this Court must resolve is whether this new evidence is a mere supplementation of the prior writ, or whether this new evidence amounts to a new writ thereby rendering Rivera's claim unexhausted. If Rivera's claim is indeed unexhausted, his writ cannot be considered by this Court pursuant to 28 U.S.C. § 2254(b)(1)(A), which requires federal habeas petitioners to fully exhaust state court remedies prior to proceeding in federal court. This requirement is not

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[10] The second Fifth Circuit opinion of August 6, 2003, described that sometime after its first opinion of that same date, the Texas Court of Criminal Appeals decided to consider certain unspecified evidence, including the affidavit of Dr. Garnett. *In re Rivera*, No. 03-41069, at 1. To the extent that this evidence was considered by the state courts, it clearly does not present an exhaustion issue. Nevertheless, the evidence presented to this Court greatly exceeds that presented to any state court.

jurisdictional. Instead, it is designed to allow state courts the initial opportunity to correct their own alleged violations. *Anderson v. Johnson,* 338 F.3d 382, 386 (5th Cir. 2003).

Fortunately, a case procedurally more advanced on this issue was already being briefed to the Fifth Circuit when it came time for this Court to decide the matter at hand. For this, and for other reasons set out below, the Court has delayed its ruling until the issue was resolved in this circuit. The Fifth Circuit has now resolved the issue in *Morris v. Dretke,* 413 F.3d 484 (5th Cir. 2005). *Morris* is controlling on this issue not only because it addressed the precise legal issue at hand, but also because the facts are strikingly similar.

In *Morris,* as with Rivera in the instant case, the petitioner was on the verge of being executed when the *Atkins* decision was published. His direct appeal and petition for a writ of certiorari had already been denied as were his state and federal habeas petitions. Like Rivera, Morris then proceeded to file a subsequent application for a writ of habeas corpus claiming that he is mentally retarded and, thus, cannot be executed pursuant to *Atkins.* The evidence he produced to that court was quite similar to the kind of evidence introduced by Rivera in his state proceeding. In fact, he, too, filed his habeas petition in state court without the benefit of an IQ score after having asked the court to provide funds for an expert to perform the needed testing. The Texas Court of Criminal

Appeals eventually dismissed Morris' application as an abuse of the writ.

The following day Morris filed a request for permission to file a successive federal writ with the Fifth Circuit using the same information he presented to the state trial court. The circuit court stayed Morris' execution based on what they described as a prima facie showing of mental retardation and sent the case to the federal district court for further proceedings (just as they ultimately did in the instant case). When Morris presented his evidence to the federal district court, he, like Rivera, offered for the first time expert psychological evidence that included test results from a Wechsler Adult Intelligence Scale test ("WAIS-III") along with two other diagnostic tests.[11] The test results supported a newly-presented affidavit by a Dr. Rosin who concluded that Morris was mentally retarded. There was also additional evidence to the same effect from Dr. Garnett, the same Dr. Garnett who has testified twice in this matter. This newly-presented information led to a problem that the district court had to resolve before deciding the *Atkins* issue: did the inclusion of the additional evidence constitute a new, unexhausted

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[11] The defendant's full scale IQ score in *Morris* was a 53. If accurate, the issue of diminished intellectual capacity in that case may not be as debatable as it is in this case, although this Court notes that a low IQ score is not necessarily conclusive on this issue. *See, e.g., Ex parte Rodriguez*, 164 S.W.3d 400 (Tex. Crim. App. 2005); *Ex parte Briseno*, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004).

writ, or was it merely a "supplementation" of the original writ? This, of course, is the same initial puzzle that this Court faces.

The district court ultimately dismissed without prejudice Morris' petition based on the conclusion that the newly-presented evidence constituted an unexhausted writ. *Morris v. Dretke,* No. 4:03CV2186, 2003 WL 24270088 (S.D. Tex. Dec. 4, 2003). The Fifth Circuit reversed, writing:

> After thorough case- and fact-specific review of Morris's situation, this Court concludes that the new IQ evidence presented for the first time in federal court, although it indeed factually bolstered his sole *Atkins* claim, did not render Morris's *Atkins* claim . . . as fundamentally altered and thus unexhausted. We find Morris's case falls much closer on the spectrum to the cases where this Court has found new evidence merely supplemented the petitioner's claim.

Morris, 413 F.3d at 495. Based upon the record, it held that despite the *Atkins* claim being supported by significantly better evidence, the petition presented in federal court was not in a significantly different legal posture than was the case in state court. *Id.* at 496. The Fifth Circuit concluded that since Morris' evidence met the exhaustion requirement of § 2254(b)(1)(A), his *Atkins* claim could continue in federal court. The district court, therefore, retained full discretion to grant an evidentiary proceeding.

The Fifth Circuit's analysis was quite in depth factually, and its opinion implied that a similar analysis on a case-by-case basis might be required by the district court. Yet, at this juncture, a detailed analysis of the evidence – which will be made below when discussing the actual *Atkins* claim – is not needed. The pertinent facts in the *Morris* appeal are about as close as one can imagine to the facts herein. Furthermore, the quality of the evidence presented in support of Rivera's habeas petition is strikingly similar both in terms of the type and the amount of factual presentations made in state court, and in terms of the qualitative improvement in the evidence made in the federal *Atkins* presentation due to the additional evidence obtained after the state habeas proceedings had concluded.

That being the case, this Court finds that Rivera has indeed exhausted his state court remedies, that the presentation of new evidence does not render his *Atkins* claim unexhausted under 28 U.S.C. § 2254(b)(1)(A), and that this Court can now proceed to the merits of his *Atkins* claim considering all of the evidence presented to it.

III. THE *ATKINS* DECISION

As stated earlier, the Supreme Court in *Atkins* held that the Eighth Amendment to the Constitution forbids the execution of mentally retarded offenders. Nevertheless, having made this proclamation, it gave little by way of instruction as to how district courts

and, ultimately on appeal, circuit courts should make this determination. Indeed, the dissent emphasized the lack of solid guidelines and criticized the majority stating:

> This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game. One need only read the definitions of mental retardation adopted by the American Association on Mental Retardation and the American Psychiatric Association . . . to realize that the symptoms of this condition can readily be feigned.

Atkins, 536 U.S. at 353 (Scalia, J., dissenting). It later added:

> [Determination of a person's incapacity] is a matter of great difficulty, partly from the easiness of counterfeiting this disability . . . and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses. . . .

Id. at 354 (quoting Matthew Hale's endorsement of the common law's traditional method for taking account of guilt-reducing factors). The difficulties presented by the ability to fake symptoms, as Justice Scalia outlined above, are merely the tip of the iceberg.

Indeed, this very case presents unique problems not foreseen, or at least not forecasted, by the *Atkins* majority or by either of the two dissents. As anyone

who reads *Atkins* readily realizes, each side of a capital case will have to retain an expert, both of whom should be prepared to cover the intellectual functioning and adaptive abilities of the petitioner. This places the finder of fact in the position of having to sift through the quagmire of conflicting testimony inherent in cases that involve "dueling experts." The Texas Court of Criminal Appeals has noted this aspect on at least two occasions. *Ex parte Briseno,* 135 S.W.3d 1, 8 (Tex. Crim. App. 2004); *Ex parte Rodriguez,* 164 S.W.3d 400, 406 (Tex. Crim. App. 2005). This case certainly has that obvious feature; however, it is further complicated by the defendant's long-term drug usage, the fact that Spanish is his first language, and the fact that his childhood records are, at best, incomplete. When one adds those factors to the possibility of feigning the condition and the subjectivity of determining a person's intellectual functioning, one can easily conclude that this is hardly the method by which the fate of a capital offender should be decided.

IV. Legal Standards of Mental Retardation

The majority in *Atkins* did not adopt any standards of proof to be used by a fact finder in determining whether a capital offender is mentally retarded. It did, however, quote both an AAMR standard and the APA definition of mental retardation. The AAMR definition of mental retardation cited by the Supreme Court is the 1992 version, which reads as follows:

> *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT 5 (9th Ed. 1992).[12] The APA definition similarly states that the essential features of mental retardation are:

> . . . significantly subaverage general intellectual functioning (Criterion A), that is accompanied by significant limitations in adaptive functioning in at least two of the following

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[12] It should be noted the AAMR published a different definition of mental retardation in 2002, the same year that *Atkins* was decided. The 2002 AAMR definition of mental retardation is: "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT 1 (10th Ed. 2002) [hereinafter "2002 AAMR Manual"]. According to the 2002 AAMR Manual, the 1992 definition replaced the 1983 definition thereby eliminating the notion of maladaptive behavior. The 1992 definition also dropped the prior practice of classifying individuals into IQ-based subgroups (mild, moderate, severe, and profound). *Id.* at 27.

> skill areas: communication, self-care, home living, social and interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health (Criterion B). The onset must occur before age 18 years (Criterion C).

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th Ed. 2000) [hereinafter "DSM-IV"].[13] The Court notes that all experts in this case have agreed that mental retardation can have a variety of etiologies and that, for *Atkins* purposes, the etiology is irrelevant.[14]

While not adopting either of these definitions as the controlling legal standard, the implication by their citation is that the Supreme Court at least does not disagree with them. The majority did concede

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[13] Both the AAMR and APA definitions of mental retardation are quite similar. Indeed, at least one other court has noted that they are "essentially congruent." *United States v. Nelson*, ___ F.Supp.2d ___, 2006 WL 571863, at *4 (E.D. La. Feb. 22, 2006).

[14] There was some evidentiary sparring over the Texas Department of Mental Health and Mental Retardation's ("TDMHMR") deletion of drug usage as the "leading cause" of mental retardation on its website, a change that occurred after the first *Atkins* hearing was held in this case. Dr. Garnett testified that the reason for this change was a shift of bureaucratic responsibilities as opposed to any real scientific debate over the proposition. The State's expert, Dr. Roger Saunders, on the other hand, indicated that it was removed in response to his inquiry to TDMHMR as to the support for the statement. The ultimate reason behind this website change has no pertinence to the issue before the Court.

that the "serious disagreement" that might result from its opinion would be "in determining which offenders are in fact retarded." *Atkins,* 536 U.S. at 317. The Supreme Court's actual ruling, however, was to refer this issue to the states: "[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* (quoting *Ford,* 477 U.S. at 405).

Having had this issue punted to it, the Texas Court of Criminal Appeals was called upon to address it in *Ex parte Briseno,* 135 S.W.3d 1 (Tex. Crim. App. 2004). That court first described the various efforts of the Texas Legislature to adopt a definition of mental retardation or to otherwise flesh out the requirements to prove the existence of mental retardation, which had failed. *Id.* at 6-7. In its review of the various possible standards, the Texas Court of Criminal Appeals reviewed the prior legislation proposed in House Bill 236. *See* Tex. H.B. 236, 77th Leg., R.S. (2001). The Bill proposed in 2001 would have codified for *Atkins* purposes a definition of mental retardation. That Bill passed both Houses in 2001 but was eventually vetoed. The next Legislature, the 78th Legislature, failed to pass any statute addressing *Atkins* despite the fact that several proposals were considered.[15]

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[15] The Texas Legislature has since finished its 2005 session as well as two special sessions and it has yet to pass legislation to govern this situation.

The *Briseno* court then looked to the Texas Health & Safety Code, which has for years defined retardation as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." TEX. HEALTH & SAFETY CODE ANN. § 591.003(13). That definition, while not exactly the same as either the AAMR or APA definitions, seemingly encompasses the same elements.

The *Briseno* court eventually adopted as a stopgap measure both the 1992 AAMR definition and the definition contained in the Texas Health & Safety Code, but raised the question of whether a definition contained in a statutory scheme designed to address social services should be applicable within a criminal context. *Briseno,* 135 S.W.3d at 7-8. However, this question was not pertinent to the Texas court's ultimate resolution of the issue because the parties in that case as well as the trial court had invoked the 1992 AAMR definition and conceded its application. *Id.* at 8.

The issue became less theoretical in *In re Hearn,* 418 F.3d 444 (5th Cir. 2005). In that case, the State attempted to attack the qualifications of the doctor diagnosing mental retardation because his qualifications did not match the standard set out in a different section of the Texas Health & Safety Code. *See* TEX. HEALTH & SAFETY CODE ANN. § 591.003(16). The Fifth Circuit rejected this attack holding that Section 591 was enacted to ensure that a continuum of quality services be provided to the mentally retarded

population and, as such, is not governing on an *Atkins* issue. *Hearn,* 418 F.3d at 447. This holding is consistent with earlier decisions by the Texas Court of Criminal Appeals. *See, e.g., Rodriguez v. State,* 899 S.W.2d 658 (Tex. Crim. App. 1995) (en banc).

The issue of whether a definition designed to address social services should be implemented in a criminal context is not limited to one concerning expertise; it goes to the very heart of the issue and embraces several problems created by the *Atkins* decision. While not adopting the AAMR definition, as stated above, the Supreme Court seemingly gave it some credence by referring to it. By failing to articulate a legal standard, such as is used in determining competency to stand trial,[16] the Court has, in effect, delegated to third parties outside the justice system the ability to determine who is or is not executed.

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[16] The test for determining whether someone is competent to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402, 402 (1960); *Carter v. Johnson,* 131 F.3d 452, 459 (5th Cir. 1997). This Court realizes that the Supreme Court technically left it to the States to define the term "mental retardation," but that ruling has the practical effect, at least in Texas, of leaving the test for determining the existence of mental retardation in a state of flux. Even the *Briseno* court noted that the social sciences definition of mental retardation "has been in a state of flux for over 65 years." *Briseno,* 135 S.W.3d at 8 n.29.

It is somewhat fortuitous that the *Atkins* majority adopted an "evolving standard" concerning the Eighth Amendment because the defintion [sic] of mental retardation is just that. This Court notes that since 1908, the AAMR or its predecessors have utilized ten different definitions of the term "mental retardation" including one adopted in 2002. *See* 2002 AAMR Manual, at 20-23. Consequently, the very definition cited by the Supreme Court in 2002 in *Atkins* (the 1992 definition) did not match the 2002 definition established by the AAMR. Thus, the AAMR definition cited in *Atkins* was out of date when published.

In fact, the entire term "mental retardation" may not be used in the future. The Board of Directors of the AAMR has voted to change its name and "explore an appropriate substitute for the term mental retardation." *Id.* at 36. This is not merely a theoretical concern as prior changes in the AAMR definition have resulted in significant changes to the number of individuals who were classified as mentally retarded. *Id.* at 26. "There is no doubt that the field of mental retardation is in a state of flux regarding not just a fuller understanding of the construct of mental retardation, but also in the language and processes we use in naming, defining, and classifying." *Id.* at 199. In fact, at least one of the motivations in adopting the 2002 definition was to ensure "adequate and appropriate services to users of the system." *Id.* at 208. Another motivation was to "integrate the vast amount of commentary and research that has occurred since the 1992 System's publication and to

operationalize more clearly the multidimensional construct of mental retardation and best-practice guidelines regarding diagnosis, classification, and planning supports for people with mental retardation." *Id.*

Regardless of the potential implications raised by allowing third parties outside of the justice system to impact the definitions of legally significant terms, this Court must nonetheless follow the course that the Supreme Court has instituted. Because the State of Texas has not codified a definition of mental retardation to be used in criminal trials, this Court looks to Texas case law for guidance. As stated earlier, the *Briseno* court discussed the available standards for determining mental retardation. It also set out certain parameters to aid Texas courts on the proper resolution of any *Atkins* issues. It first held that, while the issue is a question of fact, a jury is not needed in a post-conviction habeas situation. *Briseno*, 135 S.W.3d at 9. It further held that the burden of proof on such a motion should lie with the petitioner due in some part to the fact that the inmate has the burden of proof in a habeas situation, and in some part on the fact that many states hold mental retardation to be an affirmative defense to be proven at least by a preponderance of the evidence. *Id.* at 12. Finally, it utilized the 1992 AAMR definition.

Briseno's use of the 1992 AAMR definition may have been more a result of the fact that the parties and the trial court had used it rather than a conscious decision by the court that it was, in fact, the

best guideline available.[17] Nevertheless, the Fifth Circuit, like the *Atkins* Court, has also impliedly endorsed its use in Texas cases. For example, in *Morris,* the court wrote, "[Morris] also properly outlined the AAMR's definition for mental retardation, since adopted by the [Texas Court of Criminal Appeals] as one of Texas's current standards for determining mental retardation ... and noted the necessity to meet all three essential prongs of the definition." *Morris,* 413 F.3d at 496 (citing *Briseno,* 135 S.W.3d at 7-8). It should also be noted that the Fifth Circuit in *Hearn* discussed at length both the standard by which the *Briseno* court judged the alleged mental retardation of the petitioner and the kind of evidence that might be used. *Hearn,* 418 F.3d at 446-48. In doing so, it again ratified, albeit impliedly, the AAMR standard utilized in *Briseno* as the standard for determining mental retardation. More recently, this standard was reaffirmed by the Fifth Circuit in *United States v. Salazar,* ___ F.3d ___, 2006 WL 679018 (5th Cir. Mar. 17, 2006). In that case, the Fifth Circuit cited *Briseno* as authority for the standard being the 1992 AAMR definition.

Additionally, the parties in this case have all argued that the AAMR definition is the one that should be utilized. Although it is unclear which

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[17] The Texas Court of Criminal Appeals subsequently employed the 1992 AAMR definition in *Hall v. State,* 160 S.W.3d 24 (Tex. Crim. App. 2004), a case that was decided shortly after *Briseno.*

AAMR definition Petitioner would have this Court utilize, either the 1992 or 2002, he refers to the AAMR definition as the "widely-accepted definition of mental retardation."[18] *Docket No. 41,* at 10. Respondent argues that even though the State of Texas has not officially adopted or codified the AAMR definition of mental retardation, "[t]he [1992] AAMR definition should control because that is one of the alternative legal definitions followed by the Texas courts." *Docket No. 70,* at 8. Further, "the AAMR's three-part definition . . . is essentially codified by Texas law." *Id.*

That being the case, this Court will utilize the 1992 AAMR criteria in deciding this matter because it is the definition that has been endorsed by prior courts and because it is the definition upon which both sides agree, despite the fact that Petitioner discusses both definitions without advancing one over

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[18] Petitioner aruges [sic] that even though the 1992 AAMR definition is the one that has been adopted by previous courts, the three diagnostic criteria evinced in both the 1992 and 2002 AAMR Manuals are much the same. *Id.* at 8. According to Petitioner, the difference between the 1992 and 2002 definitions is that "the new manual places a greater emphasis on adaptive behavior deficits and describes those deficits differently." *Id.* The 1992 AAMR Manual defined adaptive behavior in terms of ten specific skills: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. The 2002 AAMR Manual focuses on three broader domains of adaptive behavior: conceptual, social, and practical skills. Petitioner states that "the ten skill areas listed in the 1992 definition can be conceptually linked to one or more of the three domains in the 2002 definition." *Id.*

the other. It is important to note, as stated before, that no court has made a factual determination based on all of the evidence before this Court. In fact, no court has seen most of the more probative evidence advanced by Rivera that is now before this Court. It is also important to note that the evidence that was reviewed by both the state trial court and the Texas Court of Criminal Appeals was reviewed prior to the decision in *Briseno* so that neither court had the benefit of using that holding as a framework by which to judge the evidence presented.

V. Issues that Complicate the Analysis of the Available Evidence

As discussed above, this case involves unique procedural aspects that stem not only from the fact that this case involves successive habeas petitions, but also from the fact that two different federal district judges have presided over Petitioner's current habeas petition. Two evidentiary hearings have been held and, although the evidence presented in each hearing is for the most part consistent, not surprisingly, the evidence itself is contradictory. There is evidence supporting Rivera's *Atkins* claim and evidence to the contrary. In some instances, the same piece of evidence is viewed as supporting the claim and disputing the claim depending upon the witness' perspective and the side that called that particular witness to testify. Nevertheless, it is not just the orientation of each witness that is compelling contradictory conclusions. To assume that would be unfair

to the witnesses called by both parties and would be far too simplistic. The evidence inherently lends itself to contradictory conclusions.

For example, until his current incarceration, Rivera had a serious drug problem that began in his middle or even his elementary school days. There is at least some agreement that his drug problems might have been the cause of some of the very problems (especially in the area of adaptive behavior) that can also be attributed in their etiology to mental retardation. It is also clear that Rivera's Hispanic background – i.e., Spanish being his first language, the language that was spoken at his home, and his language of choice – has also clouded the picture, albeit in a somewhat ironic and ambiguous fashion.[19] Moreover, even though the record contains several IQ scores, the only reliable test according to the experts from both sides is the WAIS-III test that was administered to Rivera at the age of 41 after he had been convicted of capital murder and had been denied habeas relief at both the state and federal levels. These problems overlay the other problems that are inherent in any *Atkins* case: (1) the subjectivity in analyzing adaptive behavior and even in the performance and scoring of an IQ test; (2) requiring experts to speculate retrospectively as to what conditions

[19] The Court finds irony in that it is the lawyers for the Hispanic petitioner who are arguing in favor of the validity of an English-based standardized test while the State argues that such a test is inherently biased.

existed prior to the age of 18 (what caused those conditions, when they came into existence, and what information should be used in making an assessment); (3) the obvious motivation, given the alternative, of any death row inmate to be classified as mentally retarded; and (4) the inevitable battle of dueling experts.

VI. The Problems Unforeseen by *Atkins*

As discussed earlier, the Supreme Court in *Atkins,* especially the dissenting Justices, expressed concerns about the possibility of a defendant purposefully malingering on an IQ test in order to fall under *Atkins.* This, of course, is a real danger and was suggested by the State's expert in this very case. He suggested that the most difficult type of malingering to detect is when the subject merely does not try.[20] Nevertheless, two interrelated problems not foreseen or at least not verbalized by the *Atkins* opinion have been raised by the evidence in this case, and both seem to be at least as serious as the problem of alleged malingering. The first problem is raised by the

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[20] Dr. Saunders implied that Rivera may have been malingering by pointing to the results of the first screening test – i.e., the Rey test – administered by Dr. Gilda Kessner, which will be discussed in greater detail below. He also testified that Rivera tried to convince him during his interview that he was mentally retarded and that the results of the prior IQ tests he had taken were inaccurate. Dr. Saunders noted that such behavior was uncharacteristic of mental retardation because mentally retarded individuals often attempt to mask their condition.

concept of the "practice effect." It is almost procedural in nature but it has some very substantive aspects.

Due to the "practice effect," one cannot give the WAIS-III, which is considered the gold standard, multiple times in a short period. The practice effect, at least according to one source, affects the performance portion of the test more than the verbal. Verbal IQ scores gain 2 to 3 points while performance scores jump 3 to 8 points. Such an increase could raise a full scale score by as much as 2 to 3 points.[21] Thus, the first administration, which one presumes will normally be given by a psychologist hired by the convicted individual, precludes further meaningful examination by the State. Given the subjective nature of these tests, there is much latitude for disagreement over how certain answers are scored. Rather than being able to retest the individual, the party who "goes second" is somewhat bound by the results of the first test. Commonly accepted scientific principles preclude later testing either by the second party or, as in this case, by the court.[22]

Thus, the result is that the first party that tests the individual is the only party that may present original results. The only path left for the second

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[21] *See* George C. Baroff, *Establishing Mental Retardation in Capital Cases: An Update*, 41 MENT. RETARD. 198, 199 (2003).

[22] This Court notes that it waited the prescribed year before holding a hearing concerning whether it should hire its own expert. Yet, even after waiting that year, all experts in this matter testified that Rivera could not be reliably retested.

party to follow is to criticize the test itself, the administration of the test, or the results. The second party must face the finder of fact with little original evidence of its own. This alleviates to some extent the battle of the experts that must be expected in light of *Atkins,* but it greatly hampers the fact finder. In addition to the practice effect, which stems from the act of taking the test itself, the experts theorized that the attendance of Petitioner at the hearings would also compromise the results. For instance, one of the experts in this case described the hearings as a "graduate training program in how to take the test."

While this race to the jailhouse to test the individual in question will no doubt apply in every case, this case presents an additional problem that, though unique in the cases reported since *Atkins,* will no doubt be faced again by subsequent courts. There are millions of Hispanic individuals who live on the United States-Mexico border (and throughout the United States). A large percentage of those individuals either speak only Spanish or have English skills that can be characterized as being somewhat short of fluency. If the experts who testified in this matter are accurate, as will be discussed in greater detail below, there is no reliable IQ test "normed" for this population. Thus, individuals who lack fluency in English are at a great disadvantage in proving their *Atkins* claims.

VII. Discussion

Although the 1992 AAMR definition contains three prongs that Petitioner must satisfy in order to prove his *Atkins* claim, the facts of this case are such that the first and second prongs are inextricably intertwined with the third prong. For example, Rivera has arguably presented evidence indicating that he has diminished intellectual capacity in the form of an IQ score of 68. Because a reliable IQ score ascertained before the age of 18 does not exist, Rivera asks this Court to back into the definition of mental retardation by pointing to Rivera's adaptive limitations before the age of 18 and extrapolating that they must have been a manifestation of his diminished intellectual capacity. The State, on the other hand, launches a two-fold attack on that line of reasoning. First, the State calls into question the accuracy of the IQ score because the test was administered in English and Rivera's first language is Spanish. Second, the State strongly suggests that any adaptive limitations that existed before the age of 18 were a manifestation of drug abuse rather than diminished intellectual capacity.[23] The State emphasizes that Rivera failed to present any evidence regarding his existing adaptive limitations and points to its own

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[23] An argument exists that even if Rivera has a diminished intellectual capacity due to, among other things, his abuse of inhalants, the long-term damage did not occur until after the age of 18. The State argues this point by pointing to the absence of a diagnosis of mental retardation or proof of organic brain damage in Rivera's medical records.

evidence that, at least in the artificial environment of prison, Rivera currently functions quite well. Regardless, the Court's discussion will focus on the first two prongs of the AAMR definition without trying to discuss the third prong separately since such an attempt would lead to needless repetition.

A. Limitations in Intellectual Functioning and Onset

1. The WAIS-III

The first prong of the AAMR definition requires that the petitioner establish that he has subaverage intellectual functioning. The experts that testified in both *Atkins* hearings agreed that the generally accepted method of determining an adult's intellectual capacity is the administration of a comprehensive IQ test, specifically a WAIS-III. Indeed, the WAIS-III, according to the testimony of all three experts who testified in this case, is considered the "gold standard" of IQ tests and is considered to be the most reliable means of assessing a person's intellectual capacity.[24]

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[24] The Stanford-Binet test is often mentioned in the literature as being an alternative to the WAIS-III; however, it has not been standardized for individuals above the age of 23 and, therefore, is not an available alternative means of testing Petitioner. At least in scientific lore, the Stanford-Binet is considered to be the more difficult of the two tests.

The WAIS-III is designed to assess intelligence of individuals between 16 and 89 years of age. The mean IQ is 100 and the standard deviation is 15. It was standardized on 2,450 English-speaking adults from the United States. The WAIS-III normally consists of 11 subparts testing both verbal and performance skills. In taking the test, one is not penalized for guessing.[25] If, in a particular section, one misses three answers in a row, that section is considered over and the examiner goes to the next section. Some portions of the test are timed while others are not. There appears to be some give and take between the examiner and the test subject. When the test subject does not follow the exact instructions, he is not given credit despite the fact that he demonstrates an understanding of the word and how it is used.[26] If there are some abnormalities in the test, the test administrator is required to note them in the test report. Further, as mentioned above, once an individual has been administered the WAIS-III, it cannot be administered again for at least a year due to the practice effect.

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[25] In fact, Dr. Kessner stated that, at times, Rivera got at least some credit for his second answer or guess.

[26] For example, in the second section of the test, Rivera was tested on vocabulary. He was asked to define the word "sentence" to which he questioned, "Sentenced to death?" Dr. Kessner asked him to tell her more about it and he stated, "Write a sentence." He received no credit for this inquiry despite displaying two different meanings and two relevant uses of the same word because, according to Dr. Kessner, he never actually defined the word.

No IQ score is black and white, especially a score of 68. An IQ score is really more indicative of an estimated range, which the AAMR Manual refers to as a "zone of uncertainty." 2002 AAMR Manual, at 57. An IQ score of 70 is most accurately understood "not as a precise score, but as a range of confidence with parameters of at least one [standard error of measurement] (i.e., scores of about 66 to 74; 66% probability), or parameters of two [standard errors of measurement] (i.e., scores of 62 to 78; 95% probability)." *Id.* The DSM-IV designates subaverage intellectual functioning as a score of 70 or below, and is almost always qualified by a reference to the applicable standard error of measurement. *See* Transcript of Jan. 14, 2005 Hearing, at 158.

Neither the AAMR nor the APA intend the cut-off to be fixed. A fixed IQ of 70 on the WAIS-III will identify 2.28% of the population as being mentally retarded while a fixed Stanford-Binet score of 70 will identify over 3% of the population. 2002 AAMR Manual, at 58. The difference in the two figures represents over 2 million individuals in the United States alone. *Id.* According to the 2002 AAMR Manual, the standard error of measurement should be considered in determining the existence of significant subaverage intellectual functioning. 2002 AAMR Manual, at 58. However, taking the standard error of measurement into consideration blurs the demarcation line for subaverage intellectual capacity – i.e., an IQ score of 70. The 2002 AAMR Manual states:

> In effect, this expands the operational definition of mental retardation to 75, and that score of 75 may still contain measurement error. . . . Incorporating measurement error in the definition of mental retardation serves to remind test administrators (who should understand the concept) and bureaucrats (who might not be familiar with the concept) that an achieved Wechsler IQ score of 65 means that one can be about 95% confident that the true score is somewhere between 59 and 71.

Id. at 59.

In addition to the standard deviation problem, there are other inherent problems with all standardized IQ tests. Research has shown that on any given version of a test the IQ scores will increase over time.[27] The rate of increase is about one-third of a point per year.[28] Hypothetically then, in a 15-year-old test, scores are inflated by 5 points. Thus, one can anticipate an individual to score higher in the later years of a test.[29]

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[27] *See* Transcript of Jan. 14, 2005 Hearing, at 10; *see also* Baroff, *supra* note 20, at 199; Tomoe Kanaya et al., *The Impact of Rising IQ Scores on American Society Via Mental Retardation Diagnoses*, AMERICAN PSYCHOLOGIST, Oct. 2003.

[28] This phenomenon is sometimes referred to as the "Flynn effect."

[29] If this Court were to take that concept into consideration, Rivera's adjusted score would have been 66 in 1997, the year the WAIS-III was revised, instead of the 68 he scored in 2003.

Before the 1997 version of the test became effective (the version that was administered to Rivera), it was "normed" for various sections of the population, including African and Hispanic Americans.[30] The Court heard testimony that "norming" the WAIS-III (or any other similar test) is an expensive and extensive process and is "normed" by necessity using individuals who are fluent in English. The intent of this norming process is to make the test applicable to all individuals and to perform a restandardization to keep the questions current. According to the testimony, there is no Spanish version of the WAIS-III test applicable to those adults in the United States who, like Rivera, are of Mexican descent. There is a Spanish version developed for Puerto Ricans; however, Dr. Gilda Kessner – one of Petitioner's experts – testified that "the differences in language between Puerto Rican [sic] and the population of the United States is so disparate that it can't be used over here." *See* Transcript of Jan. 14, 2005 Hearing, at 103.

2. Rivera's IQ Score

Dr. Kessner, administered the 1997 English version of the WAIS-III test to Rivera on December 1, 2003, shortly before the first *Atkins* hearing was held by Judge Vela.[31] It was administered in an interview

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[30] According to the information available to this Court, the last re-norming of the WAIS-III occurred in 1995.

[31] Although Dr. Kessner administered other tests to Rivera – specifically a Wide Range Achievement Test (WRAT-III), a

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room at the Polunsky Unit in Livingston, Texas, where Rivera is currently housed. The test had eleven sections – some sections tested verbal skills while others tested performance skills.[32] Rivera scored 66 on the verbal portion and 77 on the performance portion for a full scale score of 68. Dr. Kessner testified and her reports states that based on a score of 68, there is a 95% likelihood that Rivera's true score falls between 65 and 73.[33] Being that the agreed-upon cutoff for mental retardation is 70, this presents a truly borderline case.

One of the most contentious issues that has arisen in this case centers around the fact that the WAIS-III was administered to Rivera completely in English.[34] Both sides agree that Rivera's first

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Kaufman Functional Academic Skills Test, a Mini-Mental State Examination, a Test of Memory Malingering, and a Rey Test – most of the testimony focused on the WAIS-III test she also administered to Rivera. Therefore, the Court's discussion will focus on the WAIS-III.

[32] Dr. Kessner actually administered twelve sections to Rivera, but did not count the twelfth subpart in computing her score. Transcript Jan. 14, 2005 Hearing, at 13.

[33] Based on the materials reviewed by this Court, the WAIS-III has a margin of error of five points, which means that the range of Rivera's IQ is between 63 and 73; however, both Dr. Kessner's testimony and report use 65 as the bottom of the margin of error and this Court will rely on that evidence.

[34] It should be noted that there was some testimony suggesting that a test administered to Rivera in Spanish, even if one existed, may not be an appropriate means of testing Rivera since he may not be fluent in Spanish either.

language is Spanish and there is at least a tacit agreement that he is more comfortable speaking in Spanish. They disagree, however, as to his level of fluency in English.

Another somewhat less contentious issue is that, while the WAIS-III is arguably the more objective portion of the mental retardation analysis (since it is a standardized test), the examiner seems to have a great deal of discretion in determining whether an answer is correct.[35] In fact, in some sections, the best answer receives two points while a less than perfect answer still receives one point. A totally incorrect answer receives a zero. Within these parameters, one has a certain amount of discretion. In fact, Dr. Kessner admitted in retrospect that she would have graded at least one answer differently.[36] The issue involving the amount of discretion that goes into scoring a WAIS-III is compounded by the possibility of malingering. Although the State has conceded that gross malingering can be ruled out, there is at least some question as to whether Rivera was malingering on a smaller scale.

Finally, the record contains previous IQ scores that for the most part exceed the upper reaches of a score that would indicate mental retardation. Little

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[35] *See* GARY GROTH-MARNAT, HANDBOOK OF PSYCHOLOGICAL ASSESSMENT 139-40 (4th ed. 2003).

[36] Dr. Kessner testified that Rivera's overall score would not have been affected had he received that extra point.

information has been provided regarding those scores and, while the parties argue over their reliability, they all agree that those tests are not comparable to a full scale WAIS-III score. Given that the alternative to a mental retardation diagnosis is death, an inherent layer of doubt underlies the reliability of much of the anecdotal evidence in these proceedings, especially when no reliable IQ score exists prior to the age of 18.

a. Rivera's "Fluency" in English

Even though Rivera's first language is Spanish, Dr. Kessner testified during both *Atkins* hearings that she believed Rivera could communicate effectively in English and that the results of the WAIS-III were not compromised by his language abilities. *See also Docket No. 64,* at Ex. A. Dr. Kessner based her conclusions on her observations of Petitioner and her interactions with him during the administration of the tests.[37] At the second *Atkins* hearing, she asserted that the records she reviewed both prior to and after her previous testimony did not contradict her conclusions. Dr. Garnett echoed Dr. Kessner's conclusions in his testimony.

The State argues that the results of the WAIS-III test are rendered unreliable by the fact that Rivera's first and primary language is Spanish. Although the

[37] It should be noted that Dr. Kessner does not speak Spanish.

State's expert testified that Dr. Kessner properly administered the English version of the WAIS-III to Rivera, namely because Rivera was educated in English, it argues that he never attained a level of fluency that would allow him to take a WAIS-III test completely in English and achieve accurate results. The State's solution to what it deems to be Rivera's lack of English fluency is to heavily "qualify" the verbal portion of the WAIS-III results and to rely more heavily on the performance portion of the test as a more accurate reflection of Rivera's non-verbal intellectual capacity. Stated differently, the State asks this Court to ignore the verbal portion of the WAIS-III test because the test was administered in English and Rivera's English proficiency (or lack thereof) renders it inaccurate.

Rivera argues that the State's conclusion that the test is inaccurate because Rivera is bilingual is absurd. He believes that his English skills are such that his score of 68 on the WAIS-III is an accurate reflection of his intellectual capacity. This argument is bolstered by Dr. Kessner's testimony and by an affidavit in which she outlines the steps she took to ensure that it was appropriate to administer the test to Rivera in English. *See Docket No. 64.* Rivera believes that the combined (performance and verbal) score of 68 and the negative finding on the Rey test conclusively prove that the first prong of the AAMR definition is satisfied. He points to his academic records as support for the results of the WAIS-III emphasizing that he was forced to repeat several

grades and that he had low or failing grades in almost every class. He claims he was the "recipient" or, perhaps more accurately, the "victim" of social promotion. Indeed, at least one former teacher questioned Rivera's ability to learn, and Dr. Garnett concluded that his lack of intellectual functioning can be seen as far back as the first grade.

In order to cast doubt on Rivera's English fluency, the State points to Dr. Saunders' testimony regarding his interview of Rivera in prison. Dr. Saunders testified that Rivera spoke in broken English and that his articulation of English words was poor. Moreover, during that interview, Dr. Saunders played a recording of nine vocabulary words in Spanish that Rivera had missed during Dr. Kessner's administration of the WAIS-III in English. Rivera was able to give what Dr. Saunders considered correct answers when asked those words in Spanish. Even though Dr. Saunders' experiment has no basis in any accepted diagnostic methodology, he concluded that the results of the "demonstration" show that Rivera is more comfortable in Spanish.[38]

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[38] This Court has been troubled by the lack of scientific support for Dr. Saunders' position specifically with respect to: (1) his experiment in substituting Spanish for several questions Rivera missed during Dr. Kessner's administration of the test in English and (2) his conclusion that this Court can "qualify" these results by, in effect, relying solely on the performance portion of the WAIS-III. That being said, the substance of his overall point that a less than fluent person taking an English based IQ test is a cause for concern has widespread support. *See, e.g.*, Virginia

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As further support for this conclusion, the State pointed to the video-taped recording of Rivera giving a tour of the crime scene to Brownsville police officers and the testimony and affidavits of Rivera's sisters. Although Rivera spoke in English at the beginning of the recording, he soon reverted to Spanish for the remainder of the recording.[39] At the hearing held before Judge Vela, Rivera's sisters often switched between English and Spanish – a practice that is common here in South Texas. Additionally, one of Rivera's sisters testified that he is more comfortable speaking in Spanish. Moreover, the record contains the affidavit of one of Rivera's sisters that had to be translated from Spanish to English.

Although everyone agrees that no Spanish verison [sic] of the WAIS-III exists that has been normed to the primarily Spanish-speaking adult population of Mexican descent, the State points to the WAIS-III manual to suggest that Dr. Kessner should

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Gonzalez et al., *Theoretical and Practical Implications of Assessing Cognitive and Language Development in Bilingual Children with Qualitative Methods*, 20 BILINGUAL RES. J. 93 (1996); REBECCA KOPRIVA, COUNCIL OF CHIEF STATE SCHOOL OFFICERS, ENSURING ACCURACY IN TESTING FOR ENGLISH LANGUAGE LEARNERS Ch. 4 (2002).

[39] The Court notes that the recording depicts Rivera responding in Spanish to questions asked in English. A translated transcript of the recording shows that Rivera's answers were responsive to the questions asked in English thereby illustrating that Rivera is at least somewhat versed in English.

have made accommodations in her administration of the test to Rivera. The manual states:

> You may be similarly challenged when testing individuals who are not fluent in English or individuals for whom English is a second language. Experienced examiners have found several approaches useful, including administering the test with the assistance of a translator, using a translated version, if available, and administering it in the examinee's native language, or administering the test bilingually. All of these methods may present problems in interpreting the score. The WAIS-III normative data were collected on individuals who speak fluent English.

DAVID WESCHLER, WAIS-III ADMINISTRATION AND SCORING MANUAL 34 (3d ed. 2003). The manual does not state a clear method for making accommodations to Spanish speakers, nor does it state one way or the other whether it is appropriate to rely more heavily on one portion of the test based on language ability. However, because the test was normed using fluent English speakers, the manual at least seems to suggest that a "cleanly" given test, such as the one that was administered to Rivera by Dr. Kessner, may not be an adequate reflection of Rivera's intellectual capacity.[40] It should be noted, however, that Rivera

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[40] Petitioner himself has at least impliedly acknowledged that alternatives exist in administering the WAIS-III to non-fluent English speakers. *See Docket No. 64* at 3-4. Attached to one of his briefs is Dr. Kessner's affidavit in which she states

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has, according to the State's own evidence, been able to communicate in English and even reads books in English. Moreover, Dr. Kessner testified that while his English skills may be limited compared to some, his abilities in that regard do not invalidate the WAIS-III results.

While this Court finds the State's argument that Rivera is less than fluent in English plausible, the arguments stemming from Dr. Saunders' testimony are problematic. First, there is no scientific support for Dr. Saunders' technique of quizzing Rivera using words translated from English to Spanish and then using the results to discount the verbal WAIS-III score of 66. This experiment would not survive even the mildest *Daubert* challenge. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). It is not surprising at all to this Court, which is located in a border community with a large Hispanic population, that Rivera communicates "better" in Spanish than in English. However, the fact that a bilingual individual feels more comfortable speaking one

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that she conferred with one of her colleagues, Dr. Rudolfo Quintana, at a conference. Dr. Quintana, who is of Nicaraguan descent, allegedly has experience administering the WAIS-III to individuals in Spanish and he allegedly stated that he feels it is best to administer the WAIS-III in English to non-fluent examinees and allow them to respond in either English or Spanish. Although these statements are obviously hearsay, this Court points out that Dr. Kessner did not administer the test in the manner suggested by Dr. Quintana, namely because she does not speak Spanish.

language and the test is given in another does not in and of itself invalidate the verbal portion of the test. Indeed, even Dr. Saunders testified that Dr. Kessner properly administered the WAIS-III in English because Rivera was educated in English.

Second, when Dr. Saunders was questioned about whether the Court should "throw out" the verbal portion of Rivera's WAIS-III, he stated that he would not throw it out. Instead, he suggested that the Court should "qualify" it. However, this Court was provided with no scientific methodology for "qualifying" it and the mere suggestion that this Court should realize that the true level of his intellectual functioning should be near the performance score of 77 amounts to nothing more than guess work, even when performed by one trained in the field (much less by one trained in law rather than psychology).

Perhaps even more perplexing is the fact that Dr. Saunders' suggestions, while certainly raising doubts about the accuracy of Rivera's WAIS-III test results, raise a plethora of potential problems for this and other courts. The State concedes that the WAIS-III is the gold standard test, but wants this Court to ignore the results. Further, the State's expert agrees with those called by Rivera that it would be pointless to try to retest Rivera, the course that would otherwise seem to be most prudent. If this Court takes the State's argument to its logical conclusion, no reliable IQ test exists to examine a large portion of the adult Spanish-speaking population of the United States. If the State's position in this case is accurate, then the

results of any test administered to Rivera, or to any Spanish speaker who is not of Puerto Rican descent, is subject to questioning. Furthermore, if the State is correct, a Spanish-speaking person who is less than fluent in English and sentenced to death row may never be able to successfully raise an *Atkins* claim, or will be severely hindered in doing so because no reliable test exists to help establish the first prong of the AAMR criteria.[41]

As a district court located on the United States-Mexico border, this Court finds the second position very troubling. The number of persons in South Texas alone for whom Spanish is their primary language numbers in the tens, if not hundreds, of thousands. While the United States Census Bureau statistics are not necessarily based on scientifically controlled data, they are instructive on this issue. The United States Census Bureau estimates that over 28 million Americans speak Spanish at home and, of those, almost half speak English "less than very well."[42] US CENSUS

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[41] Given the fact that no WAIS-III test exists that has been normed to the Spanish-speaking population of Mexican descent that is not fluent in English, and no Stanford-Binet exists for mature adults, the only other alternative is to test individuals either through a translator or to have a bilingual administrator give the test. As has already been pointed out, the WAIS-III manual indicates that problems in interpreting the score will result from such an administration thereby inviting the argument that the score is unreliable.

[42] The Census Bureau broke responders into four categories: (1) those that speak English very well; (2) those that speak English well; (3) those that speak English "not well; and (4)

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BUREAU, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000 2 (Oct. 2003). Not surprisingly, the Western and Southern portions of the United States combined have about three times the number of Spanish speakers (21 million) as the Northeast and Midwest (7 million). *Id.* at 4[.] Texas has all but one of the top twenty counties in the United States with the highest proportion of non-English speakers, Santa Cruz County in Arizona being the sole exception. *Id.* at 7.

Not surprisingly, here in the Brownsville Division, the statistics are also high. The division's largest city is Brownsville, which is located in Cameron County. Brownsville's unofficial estimated population is 140,000. Approximately 109,153 individuals in Brownsville who are over the age of five speak Spanish at home. *Id.* The number of people who speak English "less than very well" totals over 69,000 or somewhere just under one half of the entire population. *Id.* If one looks at the statistics of Spanish speakers following the Rio Grande River upstream from Cameron County, one can surmise how often Spanish is spoken along the border. For example, traveling upstream from Brownsville you reach Hidalgo County (82% Spanish speakers), Starr County (90% Spanish speakers), Zapata County (78%

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those that speak English "not at all." According to the statistics, approximately eight million Spanish speakers in this country speak English "not well" or "not at all." US CENSUS BUREAU, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000 1 (Oct. 2003).

Spanish speakers), and Webb County (91% Spanish speakers) at which point the Southern District of Texas ends and the Western District begins with Maverick County (91% Spanish speakers).[43] In 2003, the population of Texas was 49.5% non-Hispanic white, 35.3% Hispanic, 10.8% African-American, and 4.3% Other.[44] By the year 2040, the Hispanic population of Texas is predicted to be over 52%.[45] Assuming this growth pattern to be accurate, that Hispanics are more likely to be Spanish speakers, and that they are not culturally Puerto Rican, the lack of an available and appropriate IQ test may present some real constitutional problems for death penalty states.

This Court presents these demographic facts and projections as background in order to illustrate the very real dilemma that the State's position presents. Its position can be reduced to the following basics:

1. The burden of proof is on the petitioner to prove mental retardation.

2. One of the three factors one must prove to be considered mentally retarded is that he or she has diminished intellectual capacity.

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[43] U.S. Census Bureau, Census 2000 Summary File 3 (SF 3) – Sample Data. These statistics are not adjusted for an individual's English speaking ability.

[44] TEXAS GUARANTEED STUDENT LOAN CORPORATION, STATE OF STUDENT AID AND HIGHER EDUCATION 3 (Sep. 2005).

[45] *Id.*

3. The established manner of proving diminished intellectual capacity is the administration of an IQ test.

4. The gold standard test for adults is the WAIS-III.

5. The WAIS-III cannot be accurately given to Spanish-speaking adults who are less than fluent in English unless they are culturally Puerto Rican.

6. Rivera is from a Spanish-speaking, Mexican-American household and is, according to the State, less than fluent in English.

7. According to the State, because he is less than fluent in English, his WAIS-III verbal score is not valid and should be "qualified" upward.

8. The Court (or anyone else for that matter) cannot accurately test or retest someone situated like Rivera because a WAIS-III test normed to the Spanish-speaking population of the United States that is not fluent in English does not exist.

9. Consequently, in theory, Rivera, or someone similarly situated, can never convincingly satisfy his burden of proof (short of an abundance of overwhelming anecdotal evidence) because he could never obtain a reliable score on any test recognized as the gold standard due to the fact that his alleged lack of

> proficiency in English disqualifies him from obtaining an accurate score in the first place.

If this position is truly the position of the State of Texas, then this Court foresees major constitutional difficulties for the State. It is, in effect, stating that only fluent English speakers can qualify for the test that may ultimately prove that they are entitled to the *Atkins* shield.

To summarize the quandary that this Court faces based upon the testimony before it:

1. Rivera's experts believe that the results of the WAIS-III given to Rivera are accurate thereby satisfying the first element of the AAMR definition of mental retardation.

2. All experts agree that Rivera cannot be retested (without affecting the reliability of the results) in English or with a Spanish translator. This is due in part to problems inherent in translating, in part on the "practice effect," and in part because he was educated in English.

3. The practice effect, while normally lasting a year, is enhanced in this case by the fact that Rivera has sat through two evidentiary hearings in which the WAIS-III was discussed in great detail.

4. No reliable IQ test exists for adults who are less than fluent in English and whose original language is Spanish but

who were "educated" in English (unless they are Puerto Rican).

5. The State, based upon the demonstration performed on Rivera by Dr. Saunders (one with no proven reliable methodology), would have this Court qualify the verbal portion of Rivera's WAIS-III test. The State would put more emphasis on the performance portion thereby putting his overall IQ at his performance score of 77, which is above the cutoff for mental retardation. Such a score would be much more in line with Rivera's prior IQ scores, albeit on less-sophisticated, group-administered screening tests.

b. The Examiner's Discretion and Malingering

The State, while not relying on the question of whether Rivera intentionally skewed the results of the WAIS-III, further attacked the efficacy of the test results by pointing to the Rey test that was administered to Rivera by Dr. Kessner. The Rey test was given to Rivera to determine if he was malingering.[46]

[46] Various studies have been conducted over the years by psychologists to determine the extent and the ability to feign mental retardation. *See, e.g.*, L. Johnstone & D.J. Cooke, *Feigned Intelligence Deficits on the Wechsler Adult Intelligence Scale – Revised*, 42 Br. J. Clin. Psychol. 303 (2003). For our purposes, it is sufficient to note that the literature indicates that further study is necessary with regard to the WAIS-III test.

A Rey test is essentially a memory test that allows an administrator to determine whether the subject is putting forth a sincere effort.[47] Dr. Kessner testified that although she gave the Rey test prior to the administration of the WAIS-III, outside noise distracted Rivera thereby ruining the results. In other words, Rivera failed the Rey test the first time it was administered with a score of 6 out of 15. Thereafter, Dr. Kessner administered the WAIS-III and then, to insure an honest effort was being put forth, re-administered the Rey test. Rivera achieved satisfactory results on the Rey test the second time with a score of 11 out of 15. The State suggests that this subsequent administration is not supported by any literature and that the satisfactory Rey score could be the result of a learning effect. Furthermore, it contends that Dr. Kessner can offer only her opinion in support of the manner in which she gave the Rey test and in support of the accuracy of the results. However, this criticism is not supported by any actual evidence of malingering, only the suggestion that it had not been satisfactorily ruled out.

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[47] Dr. Kessner also administered a Test of Memory Malingering, which is a three-part test she described as more of a standardized assessment. Transcript of January 7, 2004 Hearing, at 16. She stated that his score of 48 on that test indicated he was putting forth a sincere effort.

c. Previous IQ Scores

The WAIS-III administered by Dr. Kessner is the only fully-documented IQ test given to Rivera, at least the only one that is in evidence. The test was administered to Rivera at the age of 41 – after he was convicted of capital murder and assessed the death penalty and after he was denied habeas relief at every turn. There are at least four other IQ scores that were mentioned throughout the testimony or to which there are passing references in the exhibits. Three of those scores are the result of tests administered to Rivera in prison – two of them occurring during a previous incarceration for a different offense and one that was obtained during his current incarceration. Those scores include an 85 on a Beta II test given in June 1991, a 92 on a Beta II test given in February 1992, and an 80 on a short form WAIS-R test given in June 1994. As this case proceeded, the Court was extremely interested in those scores and it pressed the State for more information as to the types of tests that were administered, the circumstances under which they were given, and the manner in which they were scored. *See Docket No. 55.* The Court was repeatedly told that this information was unavailable. *See, e.g.,* Transcript of Tel. Conf. June 2, 2004. It was not until after both hearings were conducted and after the Court had been repeatedly told that information concerning these prior tests did not exist, that the State finally submitted information about them. *See Docket No. 70.*

The fourth IQ score of "-70" is mentioned in Rivera's Brownsville Independent School District ("BISD") records and appears to be the result of a Kuhlmann-Finch test administered while Rivera was in the third grade.[48] The Kuhlmann-Finch test (named for Dr. Fredrick Kuhlmann and Dr. Frank H. Finch) was the second test in a series developed under that format. The preceding test was the Kuhlmann-Binet test. These tests were based upon the principle that an intelligence test should measure general mental development. FRANK H. FINCH & FREDERICK KUHLMANN, KUHLMANN-FINCH TESTS: MANUAL 41-42 (2d ed. 1956). The developers of the Kuhlmann-Finch test recommended that it be repeated every two to three years in the low grades and every three to four years in the upper grades to discover changes in an individual or his environment or both. *Id.* at 59-60. No subsequent test was ever performed (or at least not recorded) by BISD on Rivera.

Although the results of the elusive tests given in prison or the Kuhlmann-Finch test given in elementary school are at least mentioned in the evidence, the actual tests are not in evidence and

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[48] The IQ score in the records is written as quoted above in the text. This Court notes that one cannot have a "negative seventy" IQ on the Kuhlmann-Finch test (or to this Court's knowledge any other IQ test for that matter). While there is no testimony that puts this score into context, one can speculate that the minus sign was intended to indicate "less than" rather than a negative number.

little information has been provided regarding them. None are a WAIS-III test, however, which both sides agree is the most reliable test for determining an adult's IQ. The Court notes that all four of these tests were shorter, screening-type tests. Moreover, all of the experts that testified in this case and all of the literature that this Court has reviewed suggests that one sacrifices accuracy for speed when one administers tests designed for screening purposes. It should also be noted that the circumstances surrounding their administration are either totally unknown or were less than ideal.

Rivera argues that this Court should ignore all previous IQ scores because they are the results of unreliable tests and the circumstances surrounding them are unknown, i.e., there is no way to determine whether they were administered properly. The State contends that these previous scores cast doubt on the reliability of Rivera's verbal score because: (1) the WAIS-III was given in English instead of Spanish, Rivera's language of choice, and (2) they are more in line with his performance score. Yet, all of the affidavits supplied to this Court strongly imply that the State gave Rivera the two Beta tests and the WAIS-R short form test in English. *See Docket No. 70.* This Court cannot help but discount the effect it gives all of these scores given the paucity of the available information, especially given its direct requests for this information that were ignored for months.

B. Limitations in Adaptive Functioning and Onset

For the most part, the State has impliedly conceded, or at least not extensively argued against, the fact that Rivera had before the age of 18 at least some limitations in adaptive functioning. The State's attack instead focuses on alternative causes for these deficits. It argues that Rivera's "extensive history of abusing inhalants," his "extensive criminal history," and his "antisocial personality features" are the causative factors of his failure to adequately function in society. The gist of their argument is that Rivera's history of substance abuse and his extensive criminal record are not reflections of mental retardation. Indeed, Dr. Garnett conceded that, as a group, mentally retarded people do not repeatedly use drugs or repeatedly commit the kinds of criminal conduct engaged in by Rivera. Rather, the State would emphasize that Rivera just has some unpleasant antisocial personality traits that place him outside the pale of societal behavior. These traits include his repeated problem with telling the truth, his impulsiveness, his irritability and aggressiveness, and his consistent irresponsibility. There is also a strong suggestion that this behavior is a manifestation of drug abuse rather than diminished intellectual capacity. To emphasize their argument, they point out that he was never diagnosed as mentally retarded, that he was never

placed in special education classes,[49] and that he did not incur any specific problem growing up that cannot be explained by his almost constant drug abuse.[50] The State also emphasizes that Rivera's defense counsel from the murder trial testified in these proceedings that he was "competent" to stand trial and was able to assist in his own defense. The State argues that although it is possible for Rivera to have "slipped through the cracks" in terms of a proper diagnosis, it is highly improbable that a person like Rivera could have slipped through the societal cracks for over forty years. It argues that there is only one plausible reason that the issue of mental retardation was only raised post-*Atkins*, some six weeks prior to Rivera's scheduled execution – it is a desperate attempt to prevent Rivera's execution.

The State also points to the observations made by prison personnel and visitors who have observed Rivera during his current incarceration to emphasize its argument that Rivera's adaptive limitations can be attributed to personality defects rather than to mental retardation. It claims that those observations belie the argument that Rivera has adaptive limitations

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[49] The record contains conflicting evidence as to whether Rivera was ever in "special education" classes as opposed to some other form of remedial class or ESL class. The substantial weight of the evidence indicates he was never formally in "special education" classes.

[50] Indeed, Dr. Saunders testified that given Rivera's long-term inhalant abuse, he was surprised that his IQ score was not lower. Transcript of Jan. 7, 2004 Hearing, vol. 3, at 394.

because he keeps himself and his cell neat and clean, he orders from the commissary and can calculate costs and prices, he reads books, and lives overall an ordered life. The State concludes that once Rivera was forced to quit his antisocial pattern of almost constant substance abuse, he functions quite well.

Rivera, on the other hand, points to multiple areas of limitations in order to substantiate a claim of limited adaptive skills. His school records show that he was "consistently held back or socially promoted." At the age of 14, he was still performing at a first or second grade level in math, reading, and writing. At the age of 17, he finally dropped out of the ninth grade. One of his teachers described his inability to perform simple tasks as matchless. Rivera's family members described a person who was often abused and incapable of caring for himself. His only "friends" were those boys with whom he sniffed inhalants. He did not play games or sports. He did not read, write, or even watch television and he slept outside under the house regardless of the cold or rain.[51] As an adult, Rivera relied on his family to provide for him and to help him find jobs that he never managed to hold. His sister or wife handled what little money he made so that he would not waste it. Rivera further argues that

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[51] Affidavits submitted by Rivera's sisters indicate that he slept outside because the house was either too crowded or too hot due to the fact that the house did not have air conditioning. There was also a suggestion that he did so because his parents banished him from the house for repeated drug usage.

the few functional skills he has now are not inconsistent with mental retardation. Indeed, his current skills in the artificial environment of prison are a far cry from true adaptive behavior and an even further cry from his skill level at the age of 18.

The most prominent aspect of Rivera's adaptive limitations is the fact that he was not only a consistent drug abuser beginning at a very young age, but he was specifically an inhalant abuser. Indeed, Rivera has argued that his inhalant abuse either contributed to or caused his mental retardation.[52] The experts agree that there can be many causes of mental retardation, including self-induced toxins to the brains. Some causes are unknown; others are attributed to genetic make-up, accidents involving head trauma, or disease. As noted above, the evidence presented is hardly overwhelming in any respect.

The Texas Court of Criminal Appeals has addressed another situation in which inhalant abuse crossed paths with allegations of possible mental retardation. *Ex parte Rodriguez,* 164 S.W.3d 400 (Tex. Crim. App. 2005). While their ultimate evaluation differs from this Court's, their analysis seems to have been quite similar. The concurring opinion went so far as to note how close a question was presented and that even the experts testified that the issue was a "close call." *Id.* at 404. It also expressed displeasure

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[52] This concept is not foreign to courts as it parallels the concepts of contributory and comparative causation.

with the *Atkins* decision and the subjectivity it has injected into death penalty decisions.

> As school children we were taught that King Solomon weighed all of the evidence before him and made a reasoned decision; Nero divined merit on a whim and just pointed his thumb up or down. I fear that, under *Atkins* and the subjective legal definition of the "adaptive deficits" prong of mental retardation, we are moving farther from King Solomon and closer to Nero.
>
> * * *
>
> But I fear there is no such bright line. There is, on the contrary, broad agreement among mental health experts that determining whether a person suffers from the type and level of "adaptive deficits" that qualifies for a mental retardation diagnosis is highly subjective and largely a matter of individual judgment.

Id. at 406. These observations ring especially true in the instant matter when one considers an extensive history of not just drug abuse, but the persistent use of inhalants, combined with a language barrier.[53]

As is widely reported both in medical texts and in the lay press, persistent and heavy inhalant abuse can result in a variety of sensory and psychological

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[53] Rivera's inhalant usage was so striking that his childhood friends nicknamed him "Sprayback".

disorders, including learning disabilities, memory loss, and personality changes.[54] Indeed, at least one of the experts testified in this case that inhalant abuse can cause mental retardation. This Court anecdotally has seen far too many young persons who have appeared before it as defendants who have permanently damaged themselves with inhalants.

As in *Ex parte Rodriguez,* the evidence concerning adaptive functioning in this case could likewise be described as a close call in light of Rivera's history of inhalant abuse. In a way, Rivera argues that one can "back into" the diagnosis of mental retardation by finding the presence of certain risk factors in adaptive functioning and extrapolating that they are a manifestation of reduced intellectual functioning. Specifically, he cites four risk factors from the 2002 AAMR Manual: (1) biomedical, (2) social, (3) behavioral, and (4) educational. *See* 2002 AAMR Manual, at 123-41. With regard to the first factor, he readily concedes a long and extensive history of inhalant abuse and postulates that it was a contributing cause, or perhaps even the sole cause, of his mental retardation. He also suggests that the abuse he suffered at the hands of his mother and neighborhood kids may have played a role, although the Court is not

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[54] The effects of inhalant ingestion on an unborn child can be similar to those caused by Fetal Alcohol Syndrome (the suggested etiology of the petitioner's alleged mental retardation in *In re Hearn*). *See* http://www.inhalants.org/about.htm (last visited Mar. 30, 2006).

impressed with either the quantity or quality of the evidence supporting this claim. He also cites poverty as a social risk factor, and impaired parenting and inadequate family support as education risk factors. He claims that all of these factors establish not only that he is mentally retarded, but that the condition existed prior to the time he reached 18.

Regardless of the cause, whether it be due to genetics, accident, disease, or self-induced by illegal drugs, the uncontroverted testimony is that if the three elements in the 1992 AAMR definition are met, a person is considered mentally retarded. This is a medical conclusion that many people may find truly offensive. This Court is troubled by the notion that one can "fry" his own brain by using illegal drugs and then be excused from some of the possible consequences of committing a gruesome and murderous act.[55] According to the dictates of the Supreme Court's decision in *Atkins,* this notion is entirely possible. Such a concept flies in the face of the laws of most states and even the United States Sentencing Guidelines. For example, Texas law holds that voluntary intoxication does not constitute a defense to the commission of a crime. TEXAS PENAL CODE § 8.04.

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[55] Other sources agree that the etiology of mental retardation is irrelevant for the purposes of proving an *Atkins* claim. For example, one author stated: "[C]ounsel need not prove the cause of mental retardation, only its existence." Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the Invisible Defendant,* 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 534 (1998).

Moreover, the federal sentencing guidelines dictate that the court may not depart below the applicable guideline range if "the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants."[56] U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2005).

Atkins proponents will suggest that a person such as Rivera is not escaping punishment, merely the death penalty. Yet, this Court points out that most of the arguments made in the majority opinion in *Atkins* (such as the diminished ability to give meaningful assistance to their counsel or the fact that, as a group, mentally retarded individuals tend do [sic] be poor witnesses on their own behalf) could equally be used to argue someone like Rivera should escape incarceration altogether.[57] Such an approach is an

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[56] This Court is not trying to compare transient conditions, such as intoxication, with the permanent condition of mental retardation. It raises this only to point out examples whereby conditions caused by the voluntary consumption of intoxicants cannot be raised as defenses to criminal acts committed while under the influence. In the instant case, if Rivera's mental retardation was truly the result of his drug usage, then all of his subsequent actions would, in a sense, be while he was under the influence.

[57] The majority's opinion cited the reduced capacity of mentally retarded offenders as a justification for making them ineligible for the death penalty. *Atkins*, 536 U.S. at 320. It further stated:

> The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally

(Continued on following page)

anathema to this Court and would be offensive to almost every law-abiding citizen of Texas, especially to the family members of victims of crimes like those committed by Rivera.

VIII. Areas of Agreement and Disagreement

Having discussed the implications of the *Atkins* decision raised by this case, this Court is nonetheless compelled to follow it. This process is best begun by describing the areas in which there is general agreement of the parties:

1. The definition of mental retardation. Both Rivera and the State agree that the AAMR standard is the correct basis for determining whether a death row inmate is mentally retarded under *Atkins*.

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retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded offenders may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Id. at 320-21 (internal citation omitted). Although the majority was careful to state that "mentally retarded offenders who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes," *Id.* at 306, many of the factors quoted above could easily be used to argue that mentally retarded offenders should escape punishment altogether because they are more likely to be convicted of a crime in the first place.

There also seems to be a consensus that the Court can use the 1992 version.

2. The WAIS-III test, which was administered by Dr. Kessner, is the gold standard, i.e., the most reliable test to determine Rivera's IQ. The test was administered according to recognized clinical standards.

3. One cannot retest Rivera to see if his score on the WAIS-III was accurate or was an aberration given the so-called "practice effect," as well as other factors mentioned above, which may skew future scores.

4. It is impossible in hindsight to separate out what may be "true" mental retardation (existing before the age of 18) from whatever damage Rivera may have done to himself from his continual use of inhalants, cocaine, and marijuana.[58]

5. Rivera was not given a comprehensive IQ test prior to the age of 18. Consequently, all of the analysis done by the experts for both sides had to use "recent" test results and then work backwards utilizing anecdotal incidents and experience in an attempt to draw an appropriate conclusion.

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[58] This statement is qualified by the fact that the State obviously feels that Rivera is not "truly" mentally retarded.

6. Neither the WAIS-III nor any of the other intelligence tests available today were designed for the purpose of determining whether a person convicted of a capital crime should live or die but are, in fact, only an estimate of one's intelligence level.

7. Although it appears to be the best test available, the WAIS-III given to Rivera was not designed to test the intelligence of an adult who is not fluent in English.

8. Rivera's first language is Spanish and his ability to communicate in English may certainly be described as less than perfect. He conversed with all of the experts in English and there is evidence indicating he speaks and reads in English. There is also anecdotal evidence of him speaking English throughout different periods of his life, including during his current incarceration.

9. Rivera was able to understand various terms that he missed while taking the WAIS-III test in English when he was asked those terms in Spanish by Dr. Saunders.

10. The fact that he attended public school in Brownsville until the age of 17, does not mean that he necessarily mastered the English language.

Conversely, in addition to the facts that have been painted, the two sides disagree regarding the following:

1. Obviously, the parties disagree as to the answer to the ultimate question: whether Rivera is mentally retarded.

2. They disagree on whether Rivera is fluent in English.

3. The parties disagree about the accuracy of the WAIS-III test administered by Dr. Kessner in large part due to the perceived language barriers.

4. They disagree as to the weight this Court should give to prior IQ tests administered by prison officials and, while the state has not argued it, this Court will presume it disagrees with the accuracy of the prior BISD IQ test if one assumes the score should be interpreted as "less than seventy."

5. They disagree as to the ultimate conclusion as to the effect of Rivera's drug abuse.

6. They disagree on the validity of the State's suggestion that this Court can cure the perceived language problem by placing more emphasis on the performance results and less on the verbal results of Rivera's WAIS-III.

7. They disagree on the cause of any behavior problems Rivera exhibited prior to the age of 18.[59]

IX. THE HOLDING

The underlying crime for which Rivera was given the death penalty is one of the most senseless and brutal crimes that this Court has ever encountered. Indeed, the facts of the crime would probably push many of those who sit on the fence in the death penalty debate off their neutral perch. Nevertheless, the Supreme Court in *Atkins* has banned the execution of mentally retarded capital offenders in the United States and has opened a Pandora's box filled with multiple issues in the process. This case illustrates the fact that the issues raised by the *Atkins* decision and the lack of guidance provided by the Supreme Court have placed courts in the position of making determinations based on assumptions and equivocal evidence with no objective guidelines in either science or law.

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[59] While, as stated above, they agree that there exists some difficulty in analyzing this topic, the State would attribute all of Rivera's adaptive problems to his almost constant drug abuse and the problems inherent thereto rather than to mental retardation. Rivera's experts either blame a combination of mental retardation and drug abuse and/or postulate that the drug abuse, itself, caused the mental retardation. Either of Rivera's suggested etiologies support his ultimate conclusion that he is mentally retarded.

With regard to the specific testimony in this case, this Court is somewhat astounded by the uncontroverted testimony that there is no appropriate gold standard test that is normed to the thousands of adult Spanish speakers in the United States who are not fluent in English. While this Court is aware of the time and expense involved in establishing and norming a test to a specific population, it seems almost implausible that neither the military, the school systems, the government, nor any private sector entity that tests or utilizes IQ tests within the United States has an accurate test to establish the IQ of an adult Spanish speaker who is not fluent in English or of Puerto Rican descent. Additionally, the evidence presented in this case was often ambivalent, unsophisticated, and incomplete and several of the arguments made by the State in this case were problematic and untenable if taken to their logical conclusion.

Having pointed out the law, the evidence, the problems in the wake of *Atkins,* and the problems presented in applying reasonable and standard psychological procedures to someone with Rivera's characteristics, this Court rules that Rivera is mentally retarded and makes the following findings and conclusions.

1. The 1992 AAMR definition of mental retardation is the appropriate standard to apply in the instant matter. It requires Petitioner to show that he has:

A. Substantial limitations in present functioning characterized by significantly subaverage intellectual functioning;

B. Existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and

C. Manifestation of both before the age of 18.

2. Rivera displayed adaptive deficits prior to the age of 18.

3. These deficits include self-care, social skills, home living, and functional academics.

4. The deficits may or may not have been caused by Rivera's diminished intellectual capacity. It is just as likely that these adaptive deficits were caused by his long-term drug abuse.

5. Rivera has a lengthy and extensive history of drug abuse, including the abuse of inhalants, marijuana, and cocaine. His drug usage could have caused in whole or in part his adaptive behavior problems and diminished intellectual functioning.

6. Rivera was given the WAIS-III IQ test, which is the best measure of intellectual capacity available today.[60]

7. The test was properly given and properly analyzed by Dr. Kessner.

8. The test resulted in a borderline score of 68 – two points below the limit established for mental retardation.

9. Rivera's performance in school as detailed both by the exhibits and by the testimony of his sisters and at least one teacher support that his subaverage intellectual functioning existed prior to the age of 18.

10. The test results along with the evidence regarding Rivera's intellectual functioning and school history establish that Rivera had significant subaverage intellectual functioning prior to the age of 18.

11. Rivera has, according to the evidence, enough fluency in English to take the WAIS-III in English and achieve reliable results.

12. This Court does not feel compelled to nor capable of "qualifying" the verbal result

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[60] This Court has previously noted that there are other tests in addition to the WAIS-III that are available to test a person's intellectual capacity. Nevertheless, the uncontroverted testimony in this case is that the WAIS-III is the gold standard and that it has no comparable competitor.

of the WAIS-III administered by Dr. Kessner as has been suggested by the State. The Court was not given any reliable methodology to perform such a task, nor was it satisfied by the evidence that such a course of action would result in a reliable score.

13. None of the other available test scores have a degree of sufficient reliability to satisfy this Court. Those that were administered in prison were not gold standard tests given in an appropriate fashion to establish a reliable IQ score. They were for the most part screening tests given in a group setting to help guide the prison system in its mission to house and care for prisoners. Additionally, these results, while being above the demarcation line for mental retardation, certainly show a less than average performance.

14. If the Court were to give these scores a high probative value, it would be compelled to give equally high consideration to the Kuhlmann-Finch test given by BISD, which resulted in a "-70" score. This score is below the demarcation line and supports Rivera's claim. Indeed, the Kuhlmann-Finch test given by BISD is the only test administered before Rivera's eighteenth birthday and, if the Court were to rely on the unsupported, group-administered tests with questions abounding about their accuracy, the

Court would be compelled to give the apparent Kuhlmann-Finch score at least comparable weight given its date.

15. The Court repeatedly asked the State to provide details about Rivera's previous IQ scores and how the tests were administered in prison. It was repeatedly told by counsel that no such details could be found. Yet, on April 16, 2005, affidavits concerning such tests were finally produced. *See Docket No. 69.* The Court finds this, at worse, to be extremely suspicious or, at best, haphazard. Either way, the information that was provided does not inspire any degree of confidence regarding the validity of those scores. Additionally, those tests were also given in English, which undermines the State's argument that the Court should qualify the WAIS-III score because it was administered in English.

16. Given the testimony concerning this data, the paucity of details surrounding their administration and scoring, and, in the case of the prison-administered tests, the manner in which information about the tests was provided, this Court finds that each score should be of some, but not controlling, weight. As such, when taken as a whole, they display a picture of an individual who is, at best, of borderline intelligence, thereby confirming the same data obtained by Dr. Kessner in her administration of the

only comprehensive IQ test given to Rivera under controlled circumstances.

Given these findings, the Court is compelled to reach a conclusion that Rivera has satisfied his burden and has proven himself to be mentally retarded as per the 1992 AAMR definition of mental retardation. The Court reaches this conclusion with great reluctance given the unconscionable nature of the crime and the tragic circumstances that have befallen the family of Luis Daniel Blanco, but does so in conformance with the Supreme Court's dictates in *Atkins*.

That being the case, this Court concludes that Rivera has indeed exhausted his state court avenues and that the presentation of new evidence did not render his *Atkins* claim unexhausted under 28 U.S.C. § 2254(b)(1)(A). This Court grants Rivera's Petition for a Writ of Habeas Corpus [Docket No. 1], and permanently enjoins Doug Dretke, Director of the Texas Department of Criminal Justice – Institutional Division, his successors, and the State of Texas from executing Jose Alfredo Rivera for the brutal murder and sexual assault of Luis Daniel Blanco.

Signed in Brownsville, Texas, this 31st day of March, 2006.

/s/ Andrew S. Hanen
Andrew S. Hanen
United States District Judge

APPENDIX C

CAUSE NO. 93-CR-1488-C

THE STATE OF TEXAS	) IN THE DISTRICT : COURT OF
VS	) : CAMERON COUNTY,
JOSE ALFREDO RIVERA	) TEXAS : 197TH JUDICIAL) DISTRICT

JUDGMENT OF CONVICTION AND SENTENCE

BE IT REMEMBERED that on the 26th day of April, 1994, this cause was called to trial and the State appeared by her Assistant Criminal District Attorney, and the Defendant, Jose Alfredo Rivera, appeared in person, his counsel by appointment, the Hon. Jose A. Esquivel, Jr. also being present, and the Defendant, having been duly arraigned, pleaded Not Guilty and both parties announced ready for trial; thereupon a jury of good and lawful persons, was selected from August 26, 1994 through May 4, 1994, to wit: Chris G. Bujanos, Jr. and eleven others, was duly selected, empaneled and sworn according to the law and charged by the Court on separation; whereupon said cause was recessed until May 6, 1994.

THEREAFTER, on May 6, 1994, the indictment was read to the jury and the Defendant entered his plea of Not Guilty thereto whereupon the State introduced evidence, whereupon said cause was recessed until May 9, 1994.

THEREAFTER, on May 9, 1994, the State continued with its evidence, whereupon said cause was recessed until May 10, 1994.

THEREAFTER, on May 10, 1994, the State continued with its evidence, whereupon the State rested, and the Defense introduced evidence through May 11, 1994, whereupon State offered rebuttal evidence. All parties closed and the jury was sent home until May 12, 1994, whereupon the charge was prepared and submitted to all counsel and the case recessed until May 12, 1994.

THEREAFTER, on May 12, 1994, the Court charged the jury as to the law applicable to said cause and argument of counsel for the State and the Defendant was duly heard and concluded, and the jury retired in charge of the proper officer to consider their verdict, and afterward was brought into open court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the Minutes of the Court, to wit:

> "We, the Jury, find the defendant "GUILTY" of the offense of Capital Murder, as charged in the Indictment.
>
> /s/ Chris G. Bujanos, Jr.
> Presiding Juror"

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Defendant,

Jose Alfredo Rivera, is guilty of the offense of Capital Murder as found by the jury, and that said offense was committed on July 9, 1993.

THEREUPON, the Defendant, having previously elected in writing to have his punishment assessed by the same jury, the same jury was duly empaneled to assess said Defendant's punishment in said cause, and the evidence submitted for the State and for the Defendant was duly heard, and at the conclusion of such evidence, the Court charged the jury with additional instructions as to the law applicable to punishment of said cause and arguments of State and Defendant were duly heard and concluded and the jury retired in charge of the proper officer to consider their verdict as to Defendant's punishment, and thereafter recessed until May 13, 1994.

Thereafter, on May 13, 1994, the jury resumed its deliberations and thereafter returned into open court, accompanied by the proper officer, the Defendant and his counsel being present, and in due form of law, the following verdict, which was received by the Court is here now entered upon the Minutes of the Court, to wit:

Special Issue No. 1

Is there a probability that the defendant, Jose Alfredo Rivera, would commit criminal acts of violence that would constitute a continuing threat to society?

Answer: We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes".

/s/ Chris G. Bujanos, Jr.
Presiding Juror

Special Issue No. 2

Do you find from the evidence beyond a reasonable doubt that Jose Alfredo Rivera, the defendant himself, actually caused the death of Luis Daniel Blanco, the deceased, on the occasion in question, or if he did not actually cause Luis Daniel Blanco's death, that he intended to kill Luis Daniel Blanco or another, or that he anticipated that a human life would be taken?

Answer: "Yes" or "No".

Answer: Yes

/s/ Chris G. Bujanos, Jr.
Presiding Juror

Special Issue No. 3

Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Answer: We, the jury, unanimously find and determine that the answer to this Special Issue is "NO".

/s/ Chris G. Bujanos, Jr.
Presiding Juror

IT IS, THEREFORE, CONSIDERED, AND ADJUDGED BY THE COURT that the Defendant, Jose Alfredo Rivera, is guilty of the offense of Capital Murder as found by the Jury, and that he be punished, in accordance with the Special Issue answers of the Jury, by Death, and that the State of Texas do have and recover of and from said Defendant all costs in this prosecution, for which execution may issue.

IT IS FURTHER ORDERED by the Court that defendant's left or right thumb be fingerprinted, and that said fingerprint be marked as Exhibit "A" and is made a part hereof for all purposes.

SIGNED FOR ENTRY: May 16, 1994.

/s/ Robert Garza
ROBERT GARZA
Judge Presiding

EXHIBIT "A"

CAUSE NO. 93-CR-1488-C

THE STATE OF TEXAS	) IN THE DISTRICT : COURT OF)
VS	: CAMERON COUNTY,) TEXAS
JOSE ALFREDO RIVERA	: 138TH JUDICIAL) DISTRICT

FINGERPRINT OF DEFENDANT'S THUMB

The following is the fingerprint of the left or right thumb of:

Jose Alfredo Rivera, Defendant in this cause, convicted of a felony in this Court.

[Fingerprint Omitted In Printing]

Taken on this 13 day of May, 1994 by:

Jesus Montalvo
(Signature)

JESUS MONTALVO,
Bailiff, 138th District Court
Title of Person Authorized to Take Fingerprints

Judgment signed for entry herein the ___ day of ___ 19___.

_____

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-70022

JOSE ALFREDO RIVERA

Petitioner-Appellee,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:

Rivera's argument that his petition for habeas corpus relief met AEDPA's statute of limitations because he filed in this court within the required time period a motion for authorization to file a successive petition, attached to which was a proposed petition, is

compelling; however, this panel is bound by *Fierro v. Cockrell*, 294 F.3d 674 (5th Cir. 2002). *See United States v. Treft*, 447 F.3d 421, 425 (5th Cir. 2006) ("Absent an intervening Supreme Court or en banc decision or a change in statutory law, we are bound to follow a prior panel's decision."), *cert. denied*, 127 S. Ct. 555 (2006). Although Rivera attached a proposed habeas petition to the motion for authorization in accordance with our rules, which was not required of the petitioner in *Fierro* and which the petitioner there did not do on his own initiative, this alone does not alter the analysis that undergirds *Fierro*. The panel in *In re Lewis*, 484 F.3d 793 (5th Cir. 2007), did not analyze this issue.

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

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(2)

No. 07-1594

Supreme Court, U.S.
FILED
AUG 25 2008
OFFICE OF THE CLERK

In the

Supreme Court of the United States

JOSE ALFREDO RIVERA,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

This is a capital case.

QUESTIONS PRESENTED

Under AEDPA, federal habeas petitioners face a strict, one-year filing period for asserting claims based on *Atkins v. Virginia*, 536 U.S. 304 (2002). On the last day of the limitations period, Petitioner Jose Alfredo Rivera raised an *Atkins* claim in state court. After the claim was rejected by several courts, the Fifth Circuit granted authorization for Rivera to file a successive habeas petition. 28 U.S.C. § 2244(b)(3). Rivera failed to file his successive writ in a timely manner and Respondent Quarterman moved for dismissal. The district court summarily denied the motion, and later granted Rivera habeas relief. On appeal, the Fifth Circuit affirmed the finding of mental retardation; however, it found Rivera's writ untimely and, accordingly, vacated in part and remanded for a determination of whether equitable tolling should apply. *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007). After his request for rehearing was denied, Rivera petitioned this Court seeking to circumvent the plain language of AEDPA:

1. Does a motion for authorization in the court of appeals that is accompanied by a proposed habeas petition satisfy 28 U.S.C. § 2244(d)'s statute of limitations?

2. Does a finding of mental retardation make Rivera "actually innocent" of the death penalty, and render the one-year statute of limitations in 2244(d)(1)(C) inapplicable?

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On the one-year anniversary of the Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) – and with no additional time remaining on AEDPA's limitations period for raising such claims, 28 U.S.C. § 2244(d)(1)(C) – Rivera[1] applied for state habeas relief asserting that he is mentally retarded. Although unsuccessful, the successive state-court proceedings statutorily tolled the *Atkins* filing deadline through August 6, 2003. 28 U.S.C. § 2244(d)(2). That same day, the Fifth Circuit granted authorization for Rivera's successive petition, and stayed his execution. 28 U.S.C. § 2244(b)(3). Despite needing to file by the following day or face being time-barred, Rivera waited five days before filing his successive petition in the appropriate district court. The Director moved for dismissal, which was denied. Following two evidentiary hearings, the district court found Rivera mentally retarded and granted habeas relief. *Rivera v. Dretke*, No. B-03-139 (S.D. Brownsville); App. 32-108.[2] While the Fifth Circuit affirmed the finding on mental retardation, it also found Rivera's petition was indeed untimely. *Rivera v. Quarterman*, 505 F.3d 349, 353-54, 361-63 (5th Cir. 2007); App. 5-9, 24-31. The court then vacated in part and remanded for an evidentiary hearing, findings, and a ruling on equitable tolling, and later denied Rivera's motion for rehearing. App. 31, 114-15.

Rivera now seeks review of the lower court's decision to vacate and remand. However, the Fifth Circuit's remand provides Rivera with an avenue for

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[1] Respondent Quarterman is referred to herein as "the Director."

[2] "App." refers to the appendix accompanying Rivera's petition for writ of certiorari, whereas "Cert. Pet." denotes Rivera's actual petition.

relief which, if granted, would excuse his failure to timely file his petition and moot both the questions presented. In any event, there is no circuit conflict that warrants review concerning the timeliness of Rivera's petition or the existence of an "actual innocence" exception to AEDPA's statute of limitations. Because Rivera fails to show any extraordinary circumstance, his petition for writ of certiorari should be denied with prejudice.

STATEMENT OF THE CASE

I. Facts of the Crime

Rivera's guilt is not disputed. The evidence supporting the underlying capital-murder conviction was succinctly summarized in a prior opinion:

> On July 10, 1993, the body of Luis [Blanco][3] was discovered floating face down in a resaca[4] located in Lincoln Park in Brownsville, Texas. His shorts and tennis shoes were found in the water near his body. A ligature created from the waistband of his underwear was tied around his neck and the police observed signs that he had been sexually molested. Shortly thereafter, police took Veronica Zavala, a neighbor of the Blanco family, into custody. She gave a statement implicating [Rivera] in the murder and he was then also

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[3] Parts of the state court record referred to the victim as Daniel Luis Blanco.

[4] A resaca, or an oxbow lake, is a type of waterway that resembles a canal or small river. Resacas can be spotted throughout Brownsville and the Rio Grande valley.

> taken into custody. After tendering two somewhat contradictory written statements to law enforcement officials, Rivera personally led Brownsville police officers on a guided tour of the crime scene, which was captured on film for presentation to the jury. Rivera told officers about how he had encountered Zavala, who was babysitting Luis, while walking through Lincoln Park in the middle of the afternoon. They began to talk and soon thereafter began ingesting cocaine. Subsequently, they had sexual relations with each other and then decided to rape the young victim. After sexually assaulting Luis, they used his underwear to strangle him and then dumped his body into the nearby resaca.

App. 33-34.

II. Procedural History

In May 1994, Rivera was convicted and sentenced to die for murdering three-year-old Luis Blanco during the course of an aggravated sexual assault. App. 108-12. On direct appeal, the Court of Criminal Appeals affirmed Rivera's conviction and sentence, *Rivera v. State*, No. 71,916 (Tex. Crim. App. Mar. 6, 1996) (unpublished), and Rivera did not seek certiorari review.

Rivera's initial state habeas application was denied. *Ex parte Rivera*, No. 27,065-01 (Tex. Crim. App. Dec. 16, 1998) (unpublished). His federal habeas petition was denied, *Rivera v. Johnson*, No. B-99-123 (S.D. Tex.) (unpublished 2001), as was Rivera's request for a certificate of appealability ("COA"). The Fifth Circuit also denied COA, *Rivera v. Cockrell*, No. 01-41317 (5th

Cir. Nov. 27, 2002) (unpublished per curiam), and Rivera did not seek certiorari review. The convicting court then scheduled Rivera's execution for August 6, 2003.

On June 20, 2003, Rivera filed a second state habeas application, which he supplemented five times, arguing that he is mentally retarded and entitled to relief under *Atkins*. The Court of Criminal Appeals dismissed the writ under Tex. Code Crim. Proc. art. 11.071, § 5(a), finding that Rivera failed to make a prima facie showing of mental retardation. *Ex parte Rivera*, No. 27,065-02, 2003 WL 21752841 (Tex. Crim. App. July 25, 2003) (unpublished). Rivera submitted a suggestion for rehearing on August 1st, but the court ordered that such pleadings are unauthorized under the Texas appellate rules, and declined to reconsider the matter on the court's own initiative. *Ex parte Rivera*, No. 27,065-02 (Tex. Crim. App. Aug. 5, 2003) (unpublished). This Court denied certiorari review on August 6, 2003. *Rivera v. Texas*, No. 539 U.S. 978 (2003).

Meanwhile, on August 5th, Rivera moved the Fifth Circuit for authorization to file a successive federal writ pursuant to 28 U.S.C. § 2244(b), and for a stay of execution. Following a request from the clerk, Rivera's counsel drafted a "Successive Application for a Writ of Habeas Corpus" and faxed it to the court later the same day. On August 6th, the Fifth Circuit denied Rivera's motion, holding that he failed to make a prima facie showing of retardation based on the evidence presented in state court, and that Rivera's *Atkins* claim gained strength by evidence which was never presented until Rivera moved for reconsideration. *In re Rivera*, No. 03-41065 (5th Cir. 2003) (unpublished).

On the afternoon of August 6th – the date of the scheduled execution – Rivera petitioned this Court for an

original writ of habeas corpus and a stay of execution, but the requests were denied. *In re Jose A. Rivera*, 539 U.S. 978 (2003).

Rivera next filed a third state habeas application arguing that he is mentally retarded, yet this time additionally relying on the materials previously submitted in his August 1st suggestion for reconsideration. On August 6th, the Court of Criminal Appeals clarified that it had, in fact, previously considered the materials submitted and arguments made in support of Rivera's suggestion for reconsideration, and had declined to reconsider the matter on the court's initiative. *Ex parte Rivera*, No. 27,065-03 (Tex. Crim. App. 2003) (unpublished). The Texas court then dismissed Rivera's third writ. *Id.*

On August 6th, Rivera filed a second motion for authorization in the Fifth Circuit again seeking leave to proceed on an *Atkins* claim, and asking for review of all the evidence considered by the Texas court during the third state writ proceeding.[5] The Fifth Circuit determined Rivera made a sufficient prima facie showing on the *Atkins* issue, granted authorization, and granted a stay of execution. *In re Rivera*, No. 03-41069 (5th Cir. Aug. 6, 2006) (unpublished).

Five days later on Monday, August 11, 2003, Rivera filed an "Application for a Writ of Habeas Corpus" in the district court. *Rivera v. Dretke*, No. B-03-139 (S.D.

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[5] As he had done in his first § 2244(b) motion for leave, Rivera also sought to raise a free-standing claim of actual innocence. However, unlike the previous proceedings, Rivera never submitted a proposed successive petition. Instead, in the interest of "time and economy," Rivera's motion incorporated the merits briefing from the first motion and attached proposed petition.

Brownsville) at Docket Entry ("DE") 1. The Director moved for dismissal, asserting that Rivera's successive petition is untimely. DE 7 (citing 28 U.S.C. § 2244(b)(4) & (d)(1)(C)). United States District Judge Filemon Vela denied the motion. Following an evidentiary hearing in January 2004, both sides provided briefing and reply briefing. Prior to issuing his opinion, Judge Vela was stricken with cancer and passed away.

In April 2004, the case was transferred to United States District Judge Andrew S. Hanen. The court held a second evidentiary hearing in January 2005, during which all the experts testified and answered questions posed by the court and counsel. Following additional briefing, the district court issued a memorandum opinion on March 31, 2006, finding Rivera mentally retarded, granting habeas relief, and permanently enjoining the Director and the State from executing Rivera. App. 32-107.

On appeal, the Fifth Circuit affirmed the district court's mental-retardation finding but held that Rivera's habeas petition was time-barred and, thus, vacated and remanded for a determination of *inter alia* whether equitable tolling applies. App. 24-30, 5-9, 31. Rivera petitioned for rehearing, which was denied on March 21, 2008. App. 114-15. On June 19, 2008, Rivera petitioned for certiorari review. This opposition follows.

III. Time-bar Arguments Raised Below

Rivera filed a successive state habeas application rasing an *Atkins* claim for the first time on June 20, 2003. Although this writ was dismissed on August 5th, on August 6th, Rivera filed a third state application. State habeas proceedings concluded on August 6, 2003, with the dismissal of this third application. *Ex parte*

Rivera, No. 27,065-03 (Tex. Crim. App. 2003) (unpublished). On the same day, Rivera sought leave and was granted authorization to file a successive federal habeas petition. *In re Rivera*, No. 03-41069 (5th Cir. Aug. 6, 2006) (unpublished).

Five days later on August 11th, Rivera filed his successive petition in the district court. The Director moved for dismissal, asserting that the court lacked jurisdiction to reach the merits after a secondary threshold review, 28 U.S.C. § 2244(b)(4). Alternatively, the Director asserted that Rivera's petition is untimely because, even with statutory tolling through the August 6th conclusion of state-court review, 28 U.S.C. § 2244(d)(2), the petition was filed past the one-year limitations period provided by § 2244(d)(1)(C), and Rivera was not entitled to equitable tolling. Rivera never filed an opposition to the motion. At a status conference in September 2003, United States District Judge Vela denied the motion without argument, or explanation, from Rivera.[6]

On appeal, the Director argued that the court erred in denying his motion to dismiss.[7] In his primary brief,

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[6] After the jurisdictional argument was denied, the Director sought a ruling on the time-bar, to which Judge Vela responded: "Denied. You will preserve your exception. We can revisit those matters." Transcript of Status Conference Proceeding at 4. When Rivera later verified whether the court had denied the motion in its entirety, District Judge Vela responded, "If the State wants to, they can favor me with briefs and the like. I will revisit it. But for right now it stands denied." *Id.* at 11. Because the Director believed he had fully briefed the issue in his original motion, he did not file additional briefing or move the court to reconsider its ruling.

[7] The Director also challenged the finding of mental retardation, and the court's choice of de novo review.

Rivera did not dispute that his federal petition was untimely. Rather, he acknowledged AEDPA's one-year limitations period was statutorily-tolled through August 6, 2003, and that his successive petition was not filed until August 11th. Brief of Petitioner-Appellee at 17. In turn, he asked the Fifth Circuit to equitably toll for the period between the court granting authorization for leave (August 6th) and Rivera's filing in district court (August 11th). *Id.* at 29. As Rivera implored, "Absent equitable tolling, Rivera's AEDPA filing deadline was Thursday, August 7, 2003." *Id.* at 15. Rivera also invited the court create a judicial-exception to AEDPA's limitations period for "actually innocent" petitioners.

However, a few days before oral argument, Rivera asserted for the first time that his petition was *not* time-barred because his § 2244(b) motion with attached proposed petition was was filed in the Fifth Circuit before AEDPA's one-year period expired. Letter at 1.[8] On rehearing, Rivera again advanced his §2244(b) argument, but now fully briefed a new contention – that the Fifth Circuit should have transferred his successive petition to the district court in the "interest of justice." Motion at 11-14 (citing Fed. R. App. P. 22(a), and 28 U.S.C. § 1631). And while Rivera had originally advanced several reasons for equitable tolling, he now informed the Fifth Circuit that a hearing is unnecessary because his successive petition is timely. *Id.* at 1. The Fifth Circuit denied rehearing, explaining that it was bound by circuit precedent to the contrary. App. 114-15.

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[8] On April 23, 2007, the Director filed a Fed. R. App. P. 28(j) letter regarding the applicability of *In re Lewis*, 484 F.3d 793 (5th Cir. 2007). Rivera responded by letter of July 6, 2007, briefly raising his timeliness argument for the first time, and raising two additional cases concerning equitable tolling.

REASONS FOR DENYING THE WRIT

I. Review is Unwarranted Because the Fifth Circuit's Remand Provides Rivera with an Avenue for Relief That, if Granted, Will Moot Both Questions Presented.

Although this Court has reasoned that § 2244(d) is arguably subject to equitable tolling in light of extraordinary circumstances and the prisoner's diligence, the Court has never squarely decided the issue. *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 & n.8 (2005)). However, the Fifth Circuit assumed the availability of such tolling and remanded for the district court to conduct an evidentiary hearing, make specific findings, and determine whether it applies in Rivera's case. App. 6-9, 31 (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1999)).

If Rivera establishes a case for equitable tolling, then his failure to file a timely successive petition would be excused and the questions presented here would be moot. If Rivera is unsatisfied with the district court's decision, or is ultimately unsuccessful on appeal, then he has another avenue available and can raise his *Atkins* claim in a petition for clemency from the Texas Board of Pardons and Paroles. Although Rivera's case presents an unusual situation, the Court has reflected, "We cannot base our interpretation of the statute on an exceedingly rare inequity that Congress almost certainly was not contemplating and that may well be cured by equitable tolling." *Lawrence*, 127 S. Ct. at 1085.

II. The Fifth Circuit Did Not Abuse its Discretion in Deciding That a Proposed Habeas Petition Submitted on Appeal Does Not Stop AEDPA's Filing Deadline.

Rivera contends that the Fifth Circuit erred in relying on *Fierro v. Cockrell,* 294 F.3d 674 (5th Cir. 2002), to reject his argument that the timely filing of a § 2244(b) motion for authorization – accompanied by a proposed petition – is the equivalent of filing an actual federal habeas petition and, thus, satisfies AEDPA's one-year limitations period. Cert. Pet. at 9-14. He also faults the Fifth Circuit for not transferring his proposed petition to the district court in the "interest of justice" so that it would be considered timely. *Id.* at 14-17. These argument are unavailing and do not warrant review.

A. The Court's Decision in *Fierro* Forecloses Rivera's Statute-of-limitations Argument.

There is no AEDPA provision or Supreme Court precedent which supports Rivera's argument. As a result, the Fifth Circuit correctly relied on its own precedent in considering, and rejecting, Rivera's argument on rehearing. App. 115 (citing *Fierro*); *see also* App. 6 n. 5 (same). There, the court held that "a motion for authorization to file a successive petition is not itself an 'application for a writ of habeas corpus'" and "the filing of such a motion does not satisfy the one-year statute of limitations." *Fierro,* 294 F.3d at 680-81. Rather, it is merely a preliminary motion. *Id.* at 681; *see Woodford v. Garceau,* 538 U.S. 202, 205-08 (2003) (distinguishing preliminary motions from habeas applications for AEDPA purposes).

Rivera contends that *Fierro's* holding is limited to those petitioners who file bare motions for authorization

whereas in his case, his motion was accompanied by a proposed habeas petition. Cert. Pet. at 10. However, it is distinction without a difference, because the analysis underlying *Fierro* holds true even if the motion includes all the essential elements of the habeas petition, *Fierro*, 294 F.3d at 681, or in Rivera's case, where the motion is actually accompanied by the proposed petition.

The *Fierro* decision draws its support initially from the language of AEDPA. For example, the AEDPA provision governing successive petitions "implicitly recognizes a distinction between a motion for authorization and an application for a writ of habeas corpus":

> Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Fierro, 294 F.3d at 680 (citing 28 U.S.C. § 2244(b)(3)(A)); *see also* 28 U.S.C. § 2244(b)(3) (court of appeals "may authorize the filing of a second or successive application" if petitioner makes requisite showing). Not only does the statute contemplate that the actual habeas application itself will be filed in the district court, but the rules of appellate procedure "explicitly require" such filing. *Fierro*, 294 F.3d at 680 (citing Fed. R. App. P. 22(a)). Moreover, § 2244(d)(1)'s statute of limitation expressly applies "to an *application* for a writ of habeas corpus" (emphasis added), not to a preliminary § 2244(b) motion.

Further support for *Fierro*'s holding is found in cases addressing the applicability of AEDPA which have similarly concluded that a habeas case is not "pending"

until the actual habeas petition is filed in federal court. *Woodford*, 538 U.S. at 210; *Fierro*, 294 F.3d at 680 (citing *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997), and *Nobles v. Johnson*, 127 F.3d 409, 413-14 (5th Cir. 1997)). As a result, only a successive habeas petition lodged or filed in the district court by August 7, 2003, would have sufficed in Rivera's case. *Fierro*, 294 F.3d at 680 & n.10 (citing *Artuz v. Bennett*, 531 U.S. 4, 8 (2000), and Fed. R. App. P. 22). Rivera did not attempt to comply with this well-established precedent and, thus, the Fifth Circuit correctly found his petition time-barred. App. 5-9.

Although Rivera argues that *Fierro* is not controlling, he is mistaken. Cert. Pet. at 10. He also insists that another Fifth Circuit panel "seemed to intimate" that the timely filing of a § 2244(b) motion accompanied by a habeas petition would suffice for AEDPA's statute of limitation purposes. Cert. Pet. at 11-12 (citing *In re Lewis, supra*). He is mistaken. As the Fifth Circuit explained in denying rehearing, *Lewis* did not analyze this issue[9] and Rivera's panel was bound by *Fierro* in the absence of any intervening en banc or Supreme Court decision to the contrary. App. 115 (citing *United States v. Treft*, 447 F.3d 4321, 425 (5th Cir.

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[9] In *Lewis*, the Fifth Circuit included in a "summary of significant dates," that "On December 8, 2006, Lewis's motion [for authorization] was filed with this court." 484 F.3d at 796. Later, the court stated Lewis's "application" was not filed until December 8, 2006, and as a result, is barred by AEDPA's statute of limitations and must be denied unless he is entitled to equitable tolling. *Id.* at 796. This statement is arguably erroneous because a proposed habeas petition is never "filed" in the circuit court as an independent pleading, and only serves the function of an exhibit or attachment to the motion seeking authorization. In any event, the Fifth Circuit denied authorization "because the motion is time-barred." *Id.* at 798.

2006)). As explained above, Rivera cites no such authority – and the Director is aware of none – which the court failed to consider.

Alternatively, Rivera argues that a circuit conflict exists that requires resolution by the Court. Cert. Pet. at 13-14. Rivera points to *Liriano v. United States*, 95 F.3d 119 (2d Cir. 1996), *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), and *Easterwood v. Champion*, 213 F.3d 1321, 1323-24 (10th Cir. 2000), as evidence that at least three other circuits have considered whether a request for authorization will satisfy the statute of limitations and, thus, his own petition should be considered timely. There is no circuit split where, at best, only one case offers a holding, but it is easily distinguishable from Rivera.

In *Liriano,* a pro se petitioner filed a 28 U.S.C. § 2255 motion in the district court just two months after AEDPA's amendments, unaccompanied by the required § 2244(b)(3) motion. The Second Circuit held that the proper procedure in such instance is for the district court to transfer the motion (or § 2254 petition) and the movant (or petitioner) would seek authorization from the circuit court or face an order denying leave. *Liriano,* 95 F.3d at 123. In dictum, the court suggested that, depending on the delay occurring before a petitioner files his application and motion in the circuit court, an issue "could be presented" whether only the later application would be considered in determining the applicant's compliance with the applicable one-year limitations period." *Id.* at 122-23. No holding was offered, and the court was only dealing with a hypothetical proposition.

Similarly, in *Easterwood*, 213 F.3d at 1324, the Tenth Circuit offered no holding, but simply assumed without explanation that AEDPA's limitations period tolled during the time a pro se petitioner's request to file

a successive petition was pending in the circuit court.

The only holding comes from the Sixth Circuit, but the case differs from Rivera's. In *Sims*, 111 F.3d at 47, the court faced a pro se petitioner who (just three months after AEDPA's enactment) filed a successive § 2255 motion to vacate without having received the necessary authorization under § 2244(b)(3). There, the court held that when a prisoner either seeks authorization directly from the district court or files his successive application without leave, then the court shall transfer the document to the circuit court and deem it filed for § 2244(d) purposes when it was given to prison authorities for mailing. *Id.* (citing *Houston v. Lack*, 487 U.S. 266, 270 (1988) (pro se inmate's notice of appeal was filed at moment of delivery to prison authorities for mailing)).

In contrast, Rivera moved for authorization from the Fifth Circuit, not the district court, and therefore Rivera had no application to deem filed. Also, Rivera's motion was properly filed with the circuit court which had jurisdiction to consider his request, so no transfer was necessary. While Sims was pro se, Rivera was represented by court-appointed federal habeas counsel who investigated and presented his *Atkins* claim. And while Sims may have been unfamiliar with AEDPA's requirements when he filed his successive § 2255 motion in July 1996, Rivera's § 2244 motion was filed by counsel in August 2003, over seven years after AEDPA's enactment. Considered together, Rivera's reliance on these cases is unavailing, and fails to demonstrate any conflict requiring this Court's resolution.

B. The Court Had No Authority to Transfer Rivera's Unfiled Proposed Habeas Petition.

Rivera asserts that his petition should be considered timely because the Fifth Circuit could have transferred his proposed habeas petition to the district court in the "interests of justice." Cert. Pet. at 15-17. He petitions the Court to "resolve the confusion in the courts below" concerning whether a time-bar can be avoided by timely filing a § 2244(b) motion and proposed petition in the circuit court instead of filing the actual § 2254 habeas petition in the district court. Cert. Pet. at 17. There is no confusion in the circuit courts, and Rivera's attempt to shift the blame to the Fifth Circuit for his untimely petition should be rejected out of hand.

As an initial matter, the Court arguably lacks jurisdiction to consider this claim. In order to properly invoke the jurisdiction of this Court, it is crucial that a federal question not only be raised in prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919). A claim first raised on rehearing "comes too late unless the court actually entertains the petition and passes upon the point." *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Godchaux Co.*, 251 U.S. at 181. It was not until Rivera moved for rehearing that he actually fully briefed this issue. Although the Fifth Circuit did entertain Rivera's complaint that *Fierro* is distinguishable, the court denied rehearing without commenting on the "interest of justice" argument. *See* App. 114-15. Even if the Court has jurisdiction, Rivera's claim does not warrant certiorari review.

Rivera initially relies on *In re Wilson*, 442 F.3d 872 (5th Cir. 2006), as authority enabling the Fifth

Circuit's transfer. Cert. Pet. at 14-16. According to Rivera, *Wilson* stands for the proposition that an unauthorized successive petition filed in the district court within the one-year limitations period can be transferred to the circuit court and considered timely. *Id.* (citing 28 U.S.C. § 1631). In *Wilson*, the court noted that if the district court had transferred, rather than dismissed, the unauthorized application, then the date of filing would have related back to the date of the initial timely filing in district court. *Wilson*, 442 F.3d at 874 n. 3.

In Rivera's case, there was no petition in the district court which required transfer. And the only pleading before the Fifth Circuit was Rivera's § 2244(b)(A) motion for authorization and for stay of execution, which the court certainly had jurisdiction to consider. *E.g.*, 28 U.S.C. § 2244(b)(3)(B) (motion shall be determined by a three-judge panel); § 2244(b)(3)(D) (court of appeals shall grant or deny the authorization). Although Rivera's motion was accompanied by a proposed habeas petition, that petition was never filed in the Fifth Circuit as a separate document, but simply served the function of an exhibit or attachment for determining whether Rivera made a prima facie showing on his *Atkins* claim. *See* 28 U.S.C. § 2244(b)(3)(C) (court of appeals may authorize filing of successive application only if it determines that the application makes a prima facie showing).

Rivera additionally relies on statutory law and federal appellate rules as authority for the Fifth Circuit to have transferred his petition. Cert. Pet. at 15-16 (citing 28 U.S.C. § 1631, and Fed. R. App. P. 22(a)). According to Rivera, a circuit conflict exists because at least two circuits utilize 28 U.S.C. § 1631 for transferring cases from the district court when an unauthorized

petition is filed. *Id.* at 16 (citing *In re Sims*, 111 F.3d at 47, and *Liriano*, 95 F.3d at 123). Rivera is mistaken because neither the statutory provision or appellate rule is applicable to this case.

Specifically, 28 U.S.C. § 1631 governs transfers to cure want of jurisdiction, and provides that whenever a civil action *is filed in a court* and that court later finds there is a want of jurisdiction, the court shall transfer the case to the appropriate court. In the habeas context, such transfer is appropriate because "§ 2244(b)(3)(A) acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive habeas petition until [the circuit court] has granted the petitioner permission to file one." *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000). Accordingly, the Fifth Circuit has affirmed the transfer of successive motions or petitions filed in the district court without prior authorization.[10] Thus, there is no confusion over this provision or conflict requiring resolution in this Court.

In contrast, Rivera had no unauthorized petition filed in district court, and his successive petition was never filed in the Fifth Circuit (nor could it be). Therefore, the courts had nothing to transfer. For the same reason, Rivera's argument is not supported by Rule

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[10] *E.g.*, *Henderson v. Haro*, 282 F.3d 862,863 (5th Cir. 2002) (affirming transfer of successive § 2255 motion); *In re Smith*, 142 F.3d 832, 833-34 (5th Cir. 1998) (affirming transfer of fourth habeas petition); *In re Colburn*, 65 Fed.Appx. 508, 2003 WL 1922929 at *2 (5th Cir. 2003) (unpublished) (affirming transfer of motion for stay which was construed as successive petition); *United States v. Ruiz*, 51 Fed.App. 483, 2002 WL 31319400 at *1 (5th Cir. 2002) (unpublished) (affirming transfer of Fed. R. Civ. P. 60(b) motion because it represented a successive petition requiring prior authorization).

22 of the Federal Rules of Appellate Procedure, which provides only that an application for writ of habeas corpus *made to a circuit judge* must be transferred to the appropriate district court. Cert. Pet. at 16 (citing Fed. R. App. P. 22(a)). Again, as explained above, Rivera never applied to the Fifth Circuit for habeas relief.

Finally, because Rivera allowed the one-year filing period to almost completely expire before raising his *Atkins* claim, it was imperative that he promptly file his successive petition in the district court after being granted authorization. He failed to do so, and the Fifth Circuit correctly found his petition time-barred. In light of *Fierro's* holding that a § 2244(b) motion does not stop the limitations period, Rivera should have sought leave of the district court to lodge his successive petition by August 6, 2003. He made no such attempt. The responsibility for Rivera's untimely petition rests solely with Rivera, and not the Fifth Circuit.

III. The Court of Appeals Correctly Rejected Rivera's Arguments That There Should be a Judicially-created Exception to AEDPA's Explicit Limitations Period That Would Excuse his Untimely Filing.

Rivera contends that the lower court's refusal to recognize a miscarriage-of-justice exception to the statute of limitations is in conflict with other circuits, and that the Court should review the instant case in order to resolve it. Cert. Pet. 18-25 (citing *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005), and *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000)).

Rivera's reliance on *Souter* is misplaced. The actual-innocence exception addressed there is *innocence of the crime itself*, not innocence of the death penalty.

See 395 F.3d at 596 ("If 'it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt,' the petitioner may 'pass through the gateway and argue the merits of his underlying claims.'") (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). This is a distinctly different kind of actual innocence from innocence of the penalty.[11] *See Sawyer v. Whitley*, 505 U.S. 333, 348 (1992) (actual innocence of the death penalty requires showing, by clear and convincing evidence that, but for constitutional error, no reasonable juror would find petitioner eligible for the death penalty under state law). In fact, the Sixth Circuit itself has explained that there is no such exception for innocence of the penalty. *Ross v. Berghuis*, 417 F.3d 552, 555-57 (6th Cir. 2005). Nor is there an exception for mere legal innocence. *Craig v. White*, 227 Fed.Appx. 480, 481 (6th Cir. 2007) (unpublished per curiam opinion); *Harvey v. Jones*, 179 Fed.Appx. 294, 298-99 (6th Cir. 2006) (unpublished opinion). Thus, no conflict exists that is worthy of certiorari review.

Moreover, in *Gibson* the Tenth Circuit was not considering an actual innocence exception to AEDPA's limitations period. Instead, the court suggested in dictum that *equitable tolling* would be appropriate when a petitioner is actually innocent. *Gibson*, 232 F.3d at 808 (citing *Miller v. Marr*, 141 F.3d 976 (10th Cir. 1998)). And the exception in *Miller* was, again, one for actual innocence of the crime, and not the punishment. *Miller*,

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[11] It is worth noting that Congress explicitly included an actual-innocence exception for successive petitions in § 2244(b)(2)(B) but did *not* do so in § 2244(d). Presumably, Congress did not intend for such an exception to apply. Moreover, if such an exception existed, it should comport with the one in § 2244(b)(2)(B) and be limited to actual innocence of the crime itself.

at 978 (citing *Schlup*, and *Cooper v. Oklahoma*, 517 U.S. 348, 352-56 (1996)).

Furthermore, Congress never created any "actual innocence" exception to the limitations period, even though other parts of AEDPA do refer to that doctrine. Compare 28 U.S.C. § 2244(d)(1) *with* 28 U.S.C. § 2244(b)(2)(B)(ii). Extending the existing innocence exception to permit belated filing in the manner Rivera seeks is contrary to AEDPA's purpose. With the AEDPA's enactment, Congress required state prisoners to face "an explicit limitation period" for filing federal habeas petitions. *Fisher v. Johnson*, 174 F.3d 710, 711 (5th Cir. 1999) (citing *Lonchar v. Thomas*, 517 U.S. 314, 327 (1996)). "AEDPA severely constricts the time period allowed for filing a federal habeas corpus action," compared to pre-AEDPA period when a "prisoner could wait almost a decade" before filing his habeas petition. *Fisher*, 174 F.3d at 713 n.10 (quoting *Flanagan v. Johnson*, 154 F.3d 196, 198 (5th Cir. 1998)). The Fifth Circuit correctly declined Rivera's invitation to engraft a judicial-made exception onto congressional language that is clear on its face.

Not only would a judicial-exception to the limitations period prove entirely unworkable,[12] but extending tolling beyond the circumstances specifically enumerated in the statute risks frustrating the manifest intent of Congress. *See Fierro*, 294 F.3d at 684 (although application of time-bar may "may appear formalistic – particularly in a death penalty case –" federal court must be mindful "that Congress has imposed a strict one-year

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[12] Indeed, if the Court announced an exception, then any inmate could assert an *Atkins* claim (how ever unfounded it may be) at any time, and the statute of limitations would toll regardless.

limitations period for the filing of all habeas petitions under the AEDPA, subject only to the narrowest of exceptions"); *Felder v. Johnson*, 204 F.3d 168, 172 (5th Cir. 2000) (court asked to grant equitable relief from AEDPA's strict limitations period "must be mindful of the framework Congress established in § 2244(d)"); *Cantu-Tzin v. Johnson*, 162 F.3d 295, 299 (5th Cir. 1998) ("when Congress has stepped in to balance the competing interests [of equities in capital cases], as it did in AEDPA, courts should be loath to evade that balance").

"Statutes of limitations[] necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *United States v. Locke*, 471 U.S. 84, 101 (1985). While recognizing the potential for harsh results in some cases, the Court has reasoned that it is "not free to rewrite the statute Congress has enacted." *Dodd v. United States*, 125 S. Ct. 2478, 2483 (2005). Yet even if the Court is compelled to create a judicial exception, it need not do so in this case. As explained above, the Fifth Circuit's remand provides an opportunity for Rivera to establish a case for equitable tolling but, if unsuccessful, Rivera may seek clemency.

CONCLUSION

For the foregoing reasons, the Court should decline to grant certiorari review.

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